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In the Supreme Court of the United States

COALITION OF NEW JERSEY SPORTSMEN, INC.; BOB'S LITTLE SPORTSHOP, INC.; SPRINGFIELD, INC.; ARMALITE, INC.; ROBERT L. VIDEN, JR.; STEPHEN D. MCCLURE; JOHN DOE I, II, III, IV, V, VI, VII, VIII, & IX,

Petitioners

v.

DONALD T. DIFRANCESCO, Acting Governor, *et al.*,

Respondents

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

New Jersey Statutes § 2C:39-1 *et seq.* prohibits transfer and possession of any "assault firearm," which it defines by 66 model names by specified manufacturers and any firearm "which is substantially identical to any of the firearms listed above." Certain "assault firearms" designated by the Attorney General as "legitimate" could be registered by a deadline by members of registered gun clubs. The following issues arise under the due process, free speech, and equal protection guarantees of the First and Fourteenth Amendments:

1. Whether, in the context of felony penalties for possession of a firearm without an element of knowledge of the firearm's character, the definitions of "assault firearm" as 66 names and all "substantially identical" firearms fail to provide sufficient notice to firearm owners and adequate standards for police, rendering the provisions unconstitutionally vague. This involves whether a strict standard is required for pre-enforcement review of serious crimes not requiring scienter.

2. Whether prohibiting firearms engraved with specified names made by designated manufacturers, without regard to the physical characteristics of such firearms or the removal of any characteristics, violates free speech and equal protection.

3. Whether conditioning the registration of specified firearms on membership in a private club, and making it a felony for all other persons who possessed identical firearms before the date of enactment to continue such possession, violates the rights to freedom of association and to equal protection.

PARTIES TO PROCEEDING

In addition to the respondent identified in the caption, respondents include JOHN J. FARMER, JR., Attorney General; COLONEL CARSON J. DUNBAR, Superintendent, Division of State Police; ANDREW N. YURIK, Prosecutor of Gloucester County; and PATRICIA KUNCHYNSKI, Chief of Glassboro Police Department.

The corporations which are petitioners here include COALITION OF NEW JERSEY SPORTSMEN, INC.; BOB'S LITTLE SPORTSHOP, INC.; SPRINGFIELD, INC.; and ARMALITE, INC. None of these corporations have any parent companies, and no publicly held company owns 10% or more of the stock of any of these corporations.

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OPINIONS BELOW

The opinion of the court of appeals is unpublished and is printed in the Appendix ("App.") at 1a. The unreported order denying the petition for rehearing and petition for rehearing *en banc* is at App. 11a. The opinion of the district court, App. 12a, is published at 44 F. Supp.2d 666.

JURISDICTION

On March 21, 2001, the court of appeals rendered judgment affirming the district court's order granting summary judgment to defendants-appellees. App. 8a. On April 26, 2001, the court of appeals denied the petitions for rehearing and for rehearing *en banc*. App. 11a. This Court has jurisdiction under 28 U.S.C. § 1254(l).

STATUTES AND REGULATIONS

The texts of the following are in the Appendix: United States Constitution, Amendments I and XIV; New Jersey Statutes, §§ 2C:39-1 (selected definitions), 2C:39-3j, 2C:39-5f, 2C:39-9g, 2C:39-9h, 2C:43-6a, and 2C:58-12.

STATEMENT OF THE CASE

(i) Proceedings in the Courts Below

The complaint, which was filed in 1996, sought a declaratory judgment that New Jersey's criminal prohibitions on "assault firearms," N.J.S. §§ 2C:39-1 *et seq.*, violated U.S. Const. Amend. XIV, and also sought an injunction against the

enforcement thereof. Plaintiffs include a firearms association, two firearms manufacturers, a licensed dealer, and individual firearm owners. Defendants include the Governor and law enforcement authorities of New Jersey.[1]

The district court had jurisdiction under 28 U.S.C. § 1331. On June 20, 1997, the district court denied the motions of defendants for summary judgment, to dismiss under Rule 12 (b)(6), and to stay on abstention grounds. On March 31, 1999, the court granted defendants' motion for summary judgment and denied plaintiffs' motion for summary judgment.[2] App.65a.

The court of appeals affirmed. While recognizing a split in the circuits concerning the standards for deciding whether a law is vague, it decided that a criminal statute with felony penalties and no scienter requirement was not subject to a strict standard, unless a constitutional right is implicated. App. 4-5a. The court expressed "some concerns with" with the term "substantially identical," but held that it has a core. App. 5a.

The court also held that banning firearms based on the names engraved thereon was consistent with First Amendment standards for regulation of commercial speech. The court did not address the issue of whether requiring membership in a gun club to register a firearm violated freedom of association.

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[1] Pursuant to Rule 35.3, the following successors in office are reflected herein: Acting Governor Donald T. DiFrancesco for former Governor Christine Todd Whitman; Attorney General John J. Farmer for Peter Verniero (originally Deborah T. Poritz); Col. Carson J. Dunbar, Superintendent, Division of State Police, for Carl A. Williams; Andrew N. Yurik, II, Gloucester County Prosecutor, for Harris Y. Cotton.

[2] The court found that this action is not barred by the Eleventh Amendment and abstention doctrines and that standing and ripeness requirements are met. App. 19-24a. On the merits, the court upheld parts of the Act and abstained from deciding other portions.

The court of appeals thereafter denied the petition for rehearing and petition for rehearing *en banc*.

Statement of Facts

P.L. 1990, Ch. 32, amended New Jersey Statutes ("N.J.S.") § 2C:39-1 *et seq.* ("the Act"). Section 2C:39-1w defines "assault firearm" to include specific models by named companies, "substantially identical" firearms, and certain generically-defined firearms. Section 2C:39-5f prohibits knowing possession of an assault firearm, and § 2C:39-9g prohibits transportation or sale thereof. Section 2C:43-6a(3) punishes violation by imprisonment for three to five years.[3]

Section 2C:58-12b allowed a person to register and keep an assault firearm determined by the Attorney General to be "legitimate" for target shooting, if it was purchased by May 1, 1990, and if the owner was a member of a rifle or pistol club.

Petitioners (plaintiffs-appellants below) include corporations and individuals. Coalition of New Jersey Sportsmen, Inc., consists of 57 clubs and associations representing hundreds of thousands of target shooters, hunters, and gun collectors. Bob's Little Sportshop, Inc., is a federally and State licensed dealer in firearms in Glassboro, N.J. Springfield, Inc., and ArmaLite, Inc., are federally licensed manufacturers of target rifles and other firearms and are both located at Geneseo, Illinois. Petitioners include named individuals and John Does. Respondents include New Jersey's governor, attorney general, and superintendent of state police,

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[3] Section 2C:39-3j prohibits knowing possession of a large capacity ammunition magazine, and § 2C:39-9h prohibits its transport or sale. Section 2C:43-6a(4) punishes violation by 18-months imprisonment.

together with the Gloucester County Prosecutor and the Glassboro Police Chief.

Plaintiffs who were not club members could not register assault firearms. ArmaLite, Springfield, and Bob's Little Sportshop have lost profits because they cannot market numerous firearms in New Jersey. "Defendants will cause the prosecution of persons, including plaintiffs or Coalition members, for any known or perceived violations of the Act." Compl., Jt. Answer ¶ 30. "Violation of the Act would subject plaintiffs to arrest, prosecution, incarceration, fines, confiscation of property, loss of livelihood and revocation of applicable licenses." *Id.* ¶ 32. The record is replete with contradictory answers from the State Police about the meaning of "assault firearm" as well as arrests and prosecutions.[4]

ARGUMENT

THE WRIT SHOULD BE GRANTED TO RESOLVE A CIRCUIT CONFLICT ON VAGUENESS STANDARDS FOR SERIOUS CRIMES WITHOUT SCIENTER, AND TO DECIDE WHETHER PRODUCT-NAME BANS AND REQUIRED CLUB MEMBERSHIPS ARE CONSISTENT WITH THE FIRST AMENDMENT

The court of appeals has entered a decision in conflict with the decisions of another United States court of appeals on

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[4] The district court noted that police advised a plaintiff that the AR7 rifle is not an assault firearm, and later arrested him and charged that it is an assault firearm. "Other examples are also provided, which tend to show an inconsistent application of the law based on the confusing 'substantially identical' standard used to define what is prohibited." App. 35a.

the same important matter, and in a manner which conflicts with relevant decisions of this Court. Specifically, the court of appeals rejected the view that terms in a criminal statute with no scienter requirement must be strictly reviewed for vagueness. "We decline to follow the Sixth Circuit Court of Appeals in adopting this approach." App. 5a; *see* App. 39a (opinion of district court). *See Springfield Armory, Inc. v. City of Columbus*, 29 F.3d 250 (6th Cir. 1994); *Peoples Rights Organization, Inc. v. City of Columbus*, 152 F.3d 522 (6th Cir. 1998) (both declaring "assault weapon" prohibitions vague).

The Third Circuit's disposition is consistent with that of the Second Circuit. *See Richmond Boro Gun Club, Inc. v. City of New York*, 97 F.3d 681, 684-85 (2nd Cir. 1996) (upholding "assault weapon" ordinance). However, the rule followed by the Sixth Circuit is in accord with that of the Ninth Circuit. *See Forbes v. Napolitano*, 236 F.3d 1009, 1011-12 (9th Cir. 2000).

The circuit conflict poses contradictory interpretations of this Court's precedents concerning vagueness, such as *Village of Hoffman Estates v. Flipside Hoffman Estates, Inc.*, 455 U.S. 489, 492 (1982) and *Chicago v. Morales*, 527 U.S. 41 (1999). The opinion of the court of appeals here misconstrues the rules set forth by this Court in those and related precedents.

Further, the court of appeals decided important questions of federal law that have not been, but should be, settled by this Court, and did so in a way that conflicts with relevant decisions of this Court on the First Amendment. Specifically, the court upheld a prohibition on use of a particular name on a product (here, a firearm), without regard to the product's physical features. This is inconsistent with this Court's precedents on free speech and is irrational.

Moreover, the court further upheld a requirement that, to register an otherwise banned "assault firearm" by a certain

deadline, one must have been a member of a registered gun club. This is not in accord with this Court's precedents on freedom of association (and the concomitant right not to associate) and is irrational.

I. THE ACT IS UNCONSTITUTIONALLY VAGUE

New Jersey Statutes § 2C:39-1w defines "assault firearm" to include 66 different named models and any firearm "which is substantially identical to any of the firearms listed above." Possession or sale of an assault firearm is punishable by imprisonment for three to five years. §§ 2C:39-5f, -9g, 2C:43-6a(3). No scienter is required, in that "knowledge of the character of the weapon is not an element of the offense." *State v. Pelleteri*, 294 N.J. Super. 330, 683 A.2d 555, 557 (1996), *certif. den.* 148 N.J. 461(1997).[5] Petitioners ("the Coalition") challenged several of the names[6] and particularly the term

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[5] By contrast, federal law requires proof of knowledge of "the characteristics that brought it [the weapon] within the statutory definition." *Staples v. United States*, 511 U.S. 600, 602 (1994). "There is a long tradition of widespread lawful gun ownership by private individuals in this country." *Id.* at 610.

[6] Many of the listings do not exist, are machinegun names, or are otherwise misnamed. Circuit Appendix ("Cir. App.") 143-44a. For instance, the list includes "Avtomat Kalashnikov type semi-automatic firearms." "Avtomat" is Russian for "any automatic device" or "submachine gun" (i.e., a fully automatic firearm). K. Katzner, *English-Russian/Russian-English Dictionary* 418 (N.Y. 1984). Since a semi-automatic is not automatic, the draftsman's use of Russian resulted in an oxymoron. Further, "Avtomat Kalashnikov" is not engraved on any firearm ever produced. Cir. App. 144a-145a. Yet under this designation, sportsmen have been prosecuted for rifles marked "MAK90."

Another listing is "Uzi type semi-automatic firearms. "Uzi" is a

"substantially identical" as vague.

The court of appeals held that the Act does not implicate any constitutionally protected conduct and thus may be stricken only if vague in all of its applications.[7] App. 4-5a. It rejected the rule that "a criminal statute without a scienter requirement" is subject to close scrutiny for vagueness. *Id.* at 5a. It does not matter "whether the statute challenged is civil or criminal," but only whether constitutional rights are implicated. *Id.*

This Court's latest word on the subject is *Chicago v. Morales*, 527 U.S. 41 (1999), which declared as facially vague a prohibition on loitering with "no apparent purpose" after police have ordered dispersal and one of the persons is a "criminal street gang member." The following holding is dispositive here: "[E]ven if an enactment does not reach a substantial amount of constitutionally protected conduct, it may

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man, not a gun -- the Israeli firearm designer Uziel Gal. The State Police claim that this includes the Uzi "Model A and Model B" pistols but not the "Uzi Eagle" pistol. Cir. App. 177a. Numerous other discrepancies are documented in the record.

[7] The meaning of the Second Amendment and whether it is incorporated against the States through the Fourteenth Amendment have not been raised in this litigation. "[T]he Second Amendment protects 'the right of the people to keep and bear Arms,'. . . . 'The people' protected by the Fourth Amendment, and by the First and Second Amendments, . . . refers to a class of persons who are part of a national community . . . ." *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265-66 (1990). *Printz v. United States*, 521 U.S. 898, 938 n.2 (1997) (Thomas, J., concurring) notes that "a growing body of scholarly commentary indicates that the 'right to keep and bear arms' is, as the Amendment's text suggests, a personal right. *See, e.g.*, J. Malcolm, *To Keep and Bear Arms: The Origins of an Anglo-American Right* 162 (1994); S. Halbrook, *That Every Man Be Armed, The Evolution of a Constitutional Right* (1984) . . . ." *See also* Halbrook, *Freedmen, the Fourteenth Amendment, and the Right to Bear Arms* (1998).

be impermissibly vague because it fails to establish standards for the police and public that are sufficient to guard against the arbitrary deprivation of liberty interests." *Id.* at 52.

Morales is a plurality opinion joined in by three Justices, but six Justices concurred with Part V of the opinion.[8] Part V does not suggest that any constitutionally protected interest was implicated, and instead holds that the law violated "the requirement that a legislature establish minimal guidelines to govern law enforcement." *Id.* at 60. "Recognizing that the ordinance does reach a substantial amount of innocent conduct, we turn, then, to its language to determine if it 'necessarily entrusts lawmaking to the moment-to-moment judgment of the policeman on his beat.'" *Id.*

Although the Justices who dissented differed with the majority on the answer to that question, they did not dispute the principle. Further, the Act here reaches innocent conduct – mere possession of a firearm.

The term "substantially identical" as used in the Act here is parallel with the vague terminology in *Morales*: "The 'no apparent purpose' standard for making that decision [to order dispersal] is inherently subjective because its application depends on whether some purpose is 'apparent' to the officer on the scene.'" *Id.* at 61-62. Since "we must assume that the ordinance means what it says," this Court "refused to accept the general order issued by the police department as a sufficient limitation on the 'vast amount of discretion' granted to the

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[8] Souter and Ginsburg, JJ., joined in the plurality opinion by Stevens, J. *See id.* at 66-67 (O'Connor, J., concurring, joined by Breyer, J.) ("I agree with Part V of the Court's opinion"); *id.* at 69 (Kennedy, J., concurring) ("I join Parts I, II, and V").

police in its enforcement."[9] *Id.* at 63. Loitering is "innocent and harmless," *id.* at 64, but that does not imply that it is constitutionally protected. Thus, six Justices agreed with the rule in Part V that a criminal law lacking sufficient standards is facially vague, regardless of whether it implicates a constitutional right.

The plurality opinion states that the law "does not have a sufficiently substantial impact on conduct protected by the First Amendment to render it unconstitutional," but suggests that "the freedom to loiter for innocent purposes is part of the 'liberty' protected by the Due Process Clause of the Fourteenth Amendment." *Id.* at 52-53. But that need not be resolved:

> There is no need, however, to decide whether the impact of the Chicago ordinance on constitutionally protected liberty alone would suffice to support a facial challenge under the overbreadth doctrine. . . . For it is clear that the vagueness of this enactment makes a facial challenge appropriate. This is not an ordinance that "simply regulates business behavior and contains a scienter requirement."[10]

Id. at 55.

Morales rejected the view that "to mount a successful

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[9] The Attorney General here adopted Guidelines – which "are not binding on county prosecutors" (App. 6a) – inventing the idea that "substantially identical" includes generic definitions which are no where implied in the Act. However, "the statutory definition of the term excludes unstated meanings of that term." *Stenberg v. Carhart*, 120 S. Ct. 2597, 2614 (2000).

[10] "Vagueness may invalidate a criminal law for either of two independent reasons. First, it may fail to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits; second, it may authorize and even encourage arbitrary and discriminatory enforcement." *Id.* at 56.

facial challenge, a plaintiff must 'establish that no set of circumstances exists under which the Act would be valid.'" *Id.* at 55 n.22, citing *United States v. Salerno*, 481 U.S. 739, 745 (1987). "To the extent we have consistently articulated a clear standard for facial challenges, it is not the *Salerno* formulation, which has never been the decisive factor in any decision of this Court, including *Salerno* itself . . . ."[11] *Id.* at 55 n.22. "Since we . . . conclude that vagueness permeates the ordinance, a facial challenge is appropriate." *Id.*

Justice O'Connor concurred that the "ordinance is unconstitutionally vague because it lacks sufficient minimal standards to guide law enforcement officers." *Id.* at 65-66 (O'Connor, J., concurring). Similarly, Justice Breyer denied that the ruling violated the "rules governing facial challenges," concluding that "the ordinance violates the Constitution because it delegates too much discretion to a police officer to decide whom to order to move on, and in what circumstances." *Id.* at 71 (Breyer, J., concurring). "[I]f every application of the ordinance represents an exercise of unlimited discretion, then the ordinance is invalid in all its applications." *Id.* Finding examples where a vague law might apply will not save the law:

> But the city of Chicago may no more apply *this* law to the defendants, no matter how they behaved, than could it apply an (imaginary) statute that said, "It is a crime to do wrong," even to the worst of murderers. *See Lanzetta* v. *New Jersey*, 306 U.S. 451, 453 (1939) ("If on its face the challenged provision is repugnant to the due process clause, specification of details of the offense intended to be charged would not serve to validate it").

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[11] *Salerno* concerned the constitutionality of the Bail Reform Act and presented no issue of vagueness.

Id.

Lanzetta, which this Court has cited as authority in virtually every vagueness decision, invalidated a law as facially vague without any constitutional right at stake other than the due process right not to be subject to criminal penalties for conduct which is not clearly proscribed. It invalidated a prohibition on "gang" membership as vague under the principle: "No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes." *Lanzetta*, 306 U.S. at 452-53.

The decision of the court of appeals here is at odds with this Court's jurisprudence from *Lanzetta* through *Morales*. "The standards of certainty in statutes punishing for offenses is higher than in those depending primarily upon civil sanction for enforcement." *Winters v. New York*, 333 U.S. 507, 515 (1948). Economic regulations which establish crimes have been declared facially vague.[12] *Papachristou v. Jacksonville*, 405 U.S. 156, 164 (1972), held a vagrancy prohibition facially vague even though the activities at issue "are not mentioned in the Constitution or in the Bill of Rights."

Colautti v. Franklin, 439 U.S. 379 (1979), invalidated a law requiring a physician performing an abortion to utilize certain techniques when there is "sufficient reason to believe that the fetus may be viable." *Colautti* explained:

> This Court has long recognized that the

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[12] *United States v. Cardiff*, 344 U.S. 174, 174-75 (1952) (refusal of factory owner to permit entry "at reasonable times" held vague); *United States v. L. Cohen Grocery Co.*, 255 U.S. 81, 89 (1921) ("wilfully" charging "any unjust or unreasonable rate" for "necessaries" held vague); *International Harvester Co. v. Kentucky*, 234 U.S. 216, 223-24 (1914) (Holmes, J.) (compelling persons "to guess on peril of indictment" uncertain facts "is to exact gifts that mankind does not possess").

> constitutionality of a vague statutory standard is closely related to whether that standard incorporates a requirement of mens rea. . . . Because of the absence of a scienter requirement in the provision directing the physician to determine whether the fetus is or may be viable, the statute is little more than "a trap for those who act in good faith." *United States v. Ragen*, 314 U.S. 513, 524 (1942).[13]

Id. at 395. *Ragen* was a tax-evasion case not involving constitutionally-protected conduct, and thus the above states the rule for all criminal statutes.[14]

The ordinance in *Village of Hoffman Estates v. Flipside Hoffman Estates, Inc.*, 455 U.S. 489, 492 (1982), required a business to obtain a license to sell drug paraphernalia, violation of which was punishable by fine only. An official advised the business of which products were included. *Id.* at 493. This Court held: "The degree of vagueness that the Constitution tolerates – as well as the relative importance of fair notice and fair enforcement - depends in part on the nature of the enactment." *Id.* at 498. It continued:

> Thus, economic regulation is subject to a less strict vagueness test . . . . The Court has also expressed greater tolerance of enactments with civil rather than criminal penalties because the consequences of

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[13] *Ragen, id.*, noted: "A mind intent upon willful evasion is inconsistent with surprised innocence. . . . [T]he charge . . . amply instructed the jury that scienter is an essential element of the offense."

[14] *See Hill v. Colorado*, 530 U.S. 703, 120 S. Ct. 2480, 2498 (2000) (vagueness "ameliorated" by scienter requirement). The court of appeals cited *United States v. Mishra*, 979 F.2d 301, 309 (3rd Cir. 1992), a drug paraphernalia case, but the court there stated that "our finding of scienter helps to cure a law's vagueness."

> imprecision are qualitatively less severe. And the Court has recognized that a scienter requirement may mitigate a law's vagueness, especially with respect to the adequacy of notice to the complainant that his conduct is proscribed.

Id. at 498-99. The court of appeals here (App. 4-5a) ignores that the Act is no mere economic regulation with civil penalties, but is a serious felony with no scienter element.[15]

Hoffman Estates added: "perhaps the most important factor affecting the clarity that the Constitution demands of a law is whether it threatens to inhibit the exercise of constitutionally protected rights." *Id.* at 499. This does not deny that the other factors listed above are still important, though "perhaps" not "the most" important.

Hoffman Estates found that the ordinance simply regulated business, required scienter, and imposed only civil penalties. *Id.* at 499. It upheld the terms "designed or marketed for use" as not vague, but suggested that the ordinance would have been facially vague had it been less clear — "a regulation of 'paraphernalia' alone would not provide much warning of the nature of the items regulated." *Id.* at 500 n.17.

Kolender v. Lawson, 461 U.S. 352, 353-54 (1983), held as vague on its face a requirement that persons who loiter provide a "credible and reliable" identification, which the police would determine and which thus lacked any standard. "[T]his is not a case where further precision in the statutory language is either impossible or impractical." *Id.* at 361.

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[15] *Richmond Boro Gun Club, Inc. v. City of New York*, 97 F.3d 681, 684-86 (2nd Cir. 1996), which upheld from facial challenge an "assault weapon" ban, also cites *Hoffman Estates* but fails to discuss the stricter test for criminal laws with no scienter requirement.

Kolender rejected the argument that a statute "should not be held unconstitutionally vague on its face unless it is vague in all of its possible applications." *Id.* at 358 n.8. It explained:

> The description of our holdings is inaccurate in several respects. First, it neglects the fact that we permit a facial challenge if a law reaches "a substantial amount of constitutionally protected conduct." . . . Second, where a statute imposes criminal penalties, the standard of certainty is higher. . . . This concern has, at times, led us to invalidate a criminal statute on its face even when it could conceivably have had some valid application. *See, e.g.*, . . . *Lanzetta v. New Jersey*, 306 U.S. 451 (1939).

Kolender, 461 U.S. at 358-59 n.8. Again, *Lanzetta* did not involve constitutionally-protected conduct, yet it invalidated the statute on its face even though it may have had some valid application.[16] Thus, the above rule applies to all criminal provisions.

Kolender also rejected the view that a facial challenge is restricted to First Amendment cases, also recognizing "facial challenges in the arbitrary enforcement context." *Id.* Reliance on *Hoffman Estates* was misplaced, given that "economic regulation is subject to a less strict vagueness test . . . ."[17] *Id.*

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[16] For instance, in *Lanzetta* the defendant might have confessed to being a "gang" member, just as in *Kolender* a person may have exhibited a passport and a driver's license as "credible and reliable" identification.

[17] The dissent argued that the test should be whether the law has a "core" and is not vague in all its applications, giving an example in which the ordinance would not be vague. *Id.* at 370-73 (White, J., dissenting). "The majority attempts to underplay the conflict between its decision today and the decision last Term in *Hoffman Estates* . . . ." *Id.* at 372 n.*. If true, *Kolender* is the more recent, binding precedent.

This Court's precedents were correctly followed by the Sixth Circuit in *Springfield Armory v. City of Columbus*, 29 F.3d at 251, which declared as "unconstitutionally vague on its face" a law (almost identical to that of New Jersey here) defining "assault weapon" as listed models as well as "slight modifications." "The ordinance is fundamentally irrational and impossible to apply consistently by the buying public, the sportsman, the law enforcement officer, the prosecutor or the judge." *Id.* at 252. "The average gun owner knows very little about how his gun operates or its design features." *Id.* at 253.

"A criminal statute may be facially invalid even if it has some conceivable application." *Id.* at 252 (citing *Kolender* and *Colautti*). The precedents do *not* suggest "that a facial challenge cannot succeed simply because constitutionally-protected activity is not imperiled. To the contrary, the Supreme Court has expressly stated that the question of whether or not a statute impinges on constitutionally-protected activity is but the first inquiry in a court's examination of a statute challenged on vagueness grounds." *Id.* at 254, citing *Hoffman Estates*, 455 U.S. at 494.

The Sixth Circuit again applied this Court's precedents properly in *Peoples Rights Organization, Inc. v. City of Columbus*, 152 F.3d at 533, which also held "assault weapon" definitions to be facially vague under the principle, "When criminal penalties are at stake . . . a relatively strict test is warranted." "We also must consider whether the statute contains a scienter requirement or imposes strict liability. . . . Indeed, '[i]n the absence of a scienter requirement . . . [a] statute is little more than a trap for those who act in good faith.'" *Id.* at 534, quoting *Colautti*, 439 U.S. at 395.

The Ninth Circuit agrees that the strict test for vagueness applies regardless of whether constitutionally-

protected conduct is implicated. *Forbes v. Napolitano*, 236 F.3d 1009, 1011-12 (9th Cir. 2000) (invalidating on its face a prohibition on medical procedures on certain fetal tissue due to the vagueness of the terms "experimentation," "investigation," and "routine"). The court stated the rule as follows:

> If a statute subjects transgressors to criminal penalties, as this one does, vagueness review is even more exacting. . . . In addition to defining a core of proscribed behavior to give people constructive notice of the law, a criminal statute must provide standards to prevent arbitrary enforcement. . . . Without such standards, a statute would be impermissibly vague even if it did not reach a substantial amount of constitutionally protected conduct, because it would subject people to the risk of arbitrary deprivation of their liberty. . . . Regardless of what type of conduct the criminal statute targets, the arbitrary deprivation of liberty is itself offensive to the Constitution's due process guarantee.

Id. (citations omitted).

The court of appeals here had "some concerns with" the definition of assault firearm as those that are "substantially identical" to firearms listed by name, but found the term to have a "core." App. 4-5a. Supposedly "photographs of prohibited weapons are available for comparison," allowing one to know what is "substantially identical."[18] App. 5a. By "comparison

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[18] By contrast, "we judge the statute on its face." *United States v. Harriss*, 347 U.S. 612, 617 (1954). *Sabetti v. Dipaolo*, 16 F.3d 16, 17 (1st Cir. 1994) (opinion by Breyer, C.J.) explains:

> [A] criminal statute fails to provide fair notice if a "person of ordinary intelligence," . . . "examining [only] the language of the statute," . . . would be in some way surprised that it prohibited the conduct in question. "It is not enough," we have explained, for the

with photographs," one can learn whether weapons are "the same in some essential way other than color – such as, for example, barrel or handle length, magazine capacity, or type of ammunition used . . . ."[19] App. 6a.

Yet one would have to study hundreds of features on hundreds of photographs, for the law lists 66 different models, and 23 are designated as "type(s)" or "series," indicating limitless variations. It is unclear where one would find such a collection or how one would know which features to look for. Further, photographs depict superficial, cosmetic features, but whether significant design features, such as the internal operating parts, of two firearms are "substantially identical"

> true meaning of the statute "to be apparent elsewhere," in extra-textual materials . . . . (Citations omitted.)

Robertson v. Denver, 874 P.2d 325, 334 (Colo. 1994), invalidated an "assault weapon" definition because "these characteristics cannot be readily [ascertained] by a person of common intelligence." It rejected the argument that one could study publications to learn whether a gun is derived from an assault weapon, *id.* at 334-35:

> Whether persons of ordinary intelligence must necessarily guess as to an ordinance's meaning and application does not turn on whether some source exists for determining the proper application of a law. . . . The assault weapon ordinance does not specify any source which would aid in defining what an assault pistol is, nor does it state where such a source can be found.

[19] Holding the similar term "substantial portion" of a fetus to be vague, *Planned Parenthood of Central New Jersey v. Farmer*, 220 F.3d 127, 137 (3rd Cir. 2000), asked harder questions:

> Questions immediately arise as to whether "substantial portion" is measured in terms of size or volume in relation to the remainder of the body, length of the body, functionality, or a combination of these factors. Even if "substantial portion" were only interpreted to mean size, reasonable minds may well differ as to how much of a fetus is substantial: two limbs, four limbs, at least half of its body, all but the head?

would be known only by the firearm designer.[20]

"Substantially identical" was declared vague in *State v. Merrill*, N.J. Sup. Ct., Monmouth Co. (1996), Cir. App. 288a, as follows:

> How is this Defendant or any defendant to know if his firearm is "substantially identical" unless he is intimately familiar with the nomenclature of the other 37 weapons? This is an impossibility and a task which the law cannot require. If the State wishes to ban a firearm, it's a simple task to list it or list the characteristics, which if possessed, would put the weapon in the prohibited category.

"Substantially identical" is equivalent to "slight modifications," which was held vague in *Springfield Armory*, 29 F.3d at 252. "How is the ordinary consumer to determine which changes may be considered slight? A weapon's accuracy, magazine capacity, velocity, size and shape and the caliber of ammunition it takes can all be altered." *Id.* at 253. *Springfield* further explains (*id.*):

> Even if the term "slight" did not render this provision void, the ordinance's "modification" requirement would. In order for differences to constitute a "modification" the weapon in question must have been developed from one of the listed firearms. . . . Ordinary consumers cannot be expected to know the developmental history of a particular weapon . . . .

The Coalition argued for objective standards, such as the common definition of a regulated shotgun as one with a barrel less than 18 inches in length. The court of appeals

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[20] "Gas operation" was one of the "similar features" cited to uphold an assault firearm conviction in *State v. Tanis*, N.J. Sup. Ct., App. Div. (1998). *See* Cir. App. 316a.

rejected this because manufacturers could "skirt" it by making a barrel 1/8 inch longer. App. 6a. This is like saying that going 54 mph "skirts" the 55 mph speed limit, and that the law should prohibit "going too fast," which is no standard at all.[21]

In sum, the decision conflicts with this Court's precedents on vagueness standards from *Lanzetta* to *Morales*, and is inconsistent with Sixth Circuit precedents on application of these standards to criminal prohibitions on firearms.

II. THE NAME BAN VIOLATES FREE SPEECH

The Act defines "assault firearm" in part as a firearm with a specific name made by a specific corporate person, without regard to any physical characteristic of the firearm. Censoring designated manufacturers from using certain names for products without regard to the characteristics thereof violates the rights to free speech and press and to equal protection guaranteed by the First and Fourteenth Amendments.

N.J.S. § 2C:39-1w(1) "define[s] and prohibit[s] firearms based on the words used by manufacturers to name such firearms." Compl., Jt. Answer ¶ 87. "If a particular gun is a named assault firearm pursuant to N.J.S.A. 2C:39-1w(1), it is a prohibited weapon no matter its features." Br. in Support of Defendants' Mot. for Sum. Judg. 47.

Naming petitioners-manufacturers here, § 2C:39-1w(1) includes the "Armalite AR-180 type" and the "Springfield Armory BM59 and SAR-48 type." "The Act prohibits ArmaLite from marketing in New Jersey any rifle with the words 'AR-180,' . . . inscribed on them even though such rifles would not be 'assault firearms' without the use of these words."

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[21] *See Connally v. General Constr. Co.*, 269 U.S. 385, 395 (1926) ("locality" vague, as it "provokes the inquiry, 'How near?'").

Compl., Answer ¶ 84. The parties further agree:

> The Act prohibits Springfield from selling in New Jersey any firearm, no matter what its features, with the words "Springfield Armory BM59 and SAR-48" inscribed on them. . . . . The firearm so marked could be a .22 caliber single shot, but it would still be illegal.

Pls.' State. of Material Facts, Defs.' Counter State. of Material Facts ¶ 9.

A firearm that is not named in the Act, if it is otherwise defined as an "assault firearm," may be modified and escape such classification. However, this does not "apply to firearms that are specifically listed in *N.J.S.A.* 2C:39-1w(2) as prohibited firearms." Cir. App. 173a (Dept. of Law and Public Safety, March 31, 1997).

The Attorney General asserts that a firearm is not "substantially identical" to a listed assault firearm if it does not meet certain generic criteria.[22] Cir. App. 171a-172a (Guidelines, August 19, 1996). A firearm may be removed from the assault firearm category by altering it to meet this criteria *unless* its very name is prohibited. In short, the Act bans words on firearms, not firearm designs.

"Proclaim Liberty throughout all the Land unto all the Inhabitants thereof." The First Amendment protects words engraved on metal – in this case, on the Liberty Bell – as much as words printed on paper. "The liberty of the press is not confined to newspapers . . . . The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion." *Lovell v. Griffin*, 303 U.S. 444, 452 (1938).

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[22] These generic criteria are not found in the Act or remotely implied by any of its definitions, and instead are a word-for-word rendition of federal assault weapon definitions, 18 U.S.C. § 921(a)(30)(B), (C), & (D).

The speech prohibitions here apply only to the manufacturers named in the statute. In *United States v. Playboy Entertainment Group, Inc.*, 120 S. Ct. 1878, 1885-86 (2000), the law "single[d] out particular programmers" in that it applied only to channels "dedicated to sexually-oriented programming." "One sponsor of the measure even identified appellee by name. . . . Laws designed or intended to suppress or restrict the expression of specific speakers contradict basic First Amendment principles." *Id.*

It is no excuse that the named makers can use other model names. "It is of no moment that the statute does not impose a complete prohibition. The distinction between laws burdening and laws banning speech is but a matter of degree." *Id.* at 1886. As here, *Playboy* involved "a content-based speech restriction," which invokes the strict scrutiny test. "If a statute regulates speech based on its content, it must be narrowly tailored to promote a compelling Government interest. . . . If a less restrictive alternative would serve the Government's purpose, the legislature must use that alternative." *Id.*

A less restrictive alternative is obviously available here: the legislature could define what features, other than the names, it finds objectionable. "When a plausible, less restrictive alternative is offered to a content-based speech restriction, it is the Government's obligation to prove that the alternative will be ineffective to achieve its goals." *Id.* at 1888. Moreover, "'content-based regulations are presumptively invalid,'. . . and the Government bears the burden to rebut that presumption." *Id.*, citing *R. A. V. v. St. Paul*, 505 U.S. 377, 382 (1992).

The district court here conceded that "the indirect effect of these listings are that manufacturers who wish to engage in business in New Jersey are restricted (in a very minor way) how they can name such a weapon." App. 60a. However, *Playboy* noted: "We cannot be influenced . . . by the perception that the regulation in question is not a major one because the speech is not very important. The history of the law of free expression is

one of vindication in cases involving speech that many citizens may find shabby, offensive, or even ugly." 120 S. Ct. at 1893. The legislature obviously found the listed manufacturers and the names they used to be offensive, perhaps as symbolic of some ugly "gun culture."

The court of appeals decided that the name prohibition "should be reviewed as a commercial speech regulation, subject to lesser scrutiny." App. 7a. However, a name engraved on a firearm, like the name printed on a book which is for sale, is not commercial speech. An advertisement for a firearm or a book, such as on television or in a magazine, is commercial speech.

Applying the commercial speech tests of *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n*, 447 U.S. 557, 564 (1980), the district court (whose reasoning the court of appeals endorsed) decided that, first, the state asserted "a substantial government interest" to justify the "suppression of commercial speech" here "in light of the evidence of record demonstrating the firepower of such weapons and their relation to crime . . . " App. 61a. Yet the legislature did not define generically the features of this "firepower" or the nature of these "weapons." Instead, it banned firearms engraved with specific names, and the ban endures even if the "firepower" is eliminated.

Central Hudson requires, second, that "the regulatory technique be in proportion to that interest," and third, that the incursion must be "designed carefully to achieve the State's goal." The court found that these are met, App. 60a, again ignoring that a ban on a name is not equivalent to a ban on a specific product design.

"A governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Edenfield v. Fane*, 507 U.S. 761, 770-771 (1993). No such demonstration has been made here.

The Act violates equal protection because it prohibits

products based on what is written on them and confines its prohibition to named manufacturers. The name ban eschews generic definitions which would have treated similarly-situated manufacturers and consumers alike. *See Rubin v. Coors Brewing Co.*, 514 U.S. 476, 487 (1995) (invalidating law banning disclosure of alcohol content on beer labels but allowing it on wine and spirit labels).

Equally irrational is that the prohibition is limited to products made and named by Springfield, ArmaLite, and other disfavored companies, but "left unregulated are all other firearms by non-listed manufacturers which fire exactly the same cartridges . . . ." Compl., Jt. Answer ¶ 98. By analogy, the legislature could not ban use of a given model name on a Chevrolet, but allow an equally-powerful Ford with any name.

Springfield Armory, 29 F.3d 250, invalidated a ban on a list of "assault weapons" (using the same names as New Jersey) and "slight modifications or enhancements" thereof, which it held to be vague. The court explained:

> [T]he ordinance is fundamentally irrational and impossible to apply consistently by the buying public, the sportsman, the law enforcement officer, the prosecutor or the judge. The Columbus ordinance outlaws assault weapons only by outlawing certain brand names without including within the prohibition similar assault weapons of the same type, function or capability. . . . The ordinance purports to ban "assault weapons" but in fact it bans only an arbitrary and ill-defined subset of these weapons without providing any explanation for its selections.

Id. at 252.

"Nor is there an explanation for drafting the ordinance in terms of brand name rather than generic type or category of weapon." *Id.* at 253. Since "slight modifications" was void for vagueness, the list of named firearms was irrational:

Here, the catch-all phrase is the only element that brings

> any generality to the measure. The provision seems integral to the ordinance since without it manufacturers could circumvent the ban by merely changing the names of the listed weapons. In view of the arbitrary nature of the ordinance . . . we hold the assault weapon provisions of the ordinance . . . invalid.[23]

Id. at 254.

In sum, the Act's ban on the use by specified manufacturers of specified names violates the rights to free speech and press and to equal protection of the laws.

III. THE CLUB-MEMBERSHIP REQUIREMENT VIOLATES FREEDOM OF ASSOCIATION

The First and Fourteenth Amendments to the U.S. Constitution protect the right to freedom of association and prohibit a State from denying the equal protection of the laws. The Act violates these rights by having required, as a condition of registration of assault firearms and large capacity magazines, membership in certain clubs.

Section 2C:58-12b(4) provides that an assault firearm declared "legitimate" by the Attorney General and purchased by May 1, 1990, may be registered within one year of the effective date if: the owner is "a member of a rifle or pistol club in existence prior to the effective date," the owner "joined the club no later than 210 days after the effective date," and the club files its charter with the Superintendent of State Police within 180 days of the effective date. Section 2C:39-3j makes possession of a large capacity ammunition magazine lawful only for a registrant. The registrant need not remain a club member.

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[23] *See Citizens for a Safer Community v. Rochester*, 627 N.Y.S.2d 193, 197, 204 (Sup. 1994) (invalidating "attempts to make criminal the sale or the possession of certain guns of some manufacturers while allowing the possession of essentially identical guns made by others").

The club membership requirement discriminates against petitioners who were not members within the prescribed time, but who owned "legitimate" assault firearms and large capacity magazines purchased before May 1, 1990.[24] It preconditions a liberty and property right not on prior lawful property ownership, but on membership in a private club and sacrifice of privacy interests in the fact of one's membership. By requiring membership only in the registration period, it discriminates against persons who were not members then, but who later joined a club, and in favor of persons who were members during the registration period, but who thereafter let their membership lapse.

Many gun clubs which registered with the Attorney General are affiliates of the National Rifle Association ("NRA"), which is highly political, and promotes hunting. Of 1156 members reported on club rosters, only 51, or 4.6 %, were women. A noncitizen may not join some clubs. Cir. App. 237a-238. For one who opposes the NRA or hunting, club membership required endorsement of adverse beliefs. A woman may not feel at ease in a male-dominated club. Despite this evidence, the district court concluded that the association here is not political or infused with beliefs which are offensive to some, that no fundamental right is involved, and the rational relation test applies. Cir. App. 49a, 52a-53a. The court of appeals did not address the issue.

Section 2C:58-12a required the Attorney General to promulgate a list of assault firearms "used for legitimate target-shooting purposes," adding that "this list shall include . . . any . . . assault firearm used in competitive shooting matches

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[24] Persons were not club members for various reasons, including disagreement with club beliefs on political issues, high fees, inability to be endorsed by members, desire not be associated with club members, lack of open memberships, and lack of a club within a convenient distance. Cir. App. 228a-229a,162a-163a.

sanctioned by the Director of Civilian Marksmanship ["DCM"] of the United States Department of the Army." DCM-sanctioned matches, like shooting matches in general, require no club membership. Membership in a club is not a condition for eligibility for participation in the Civilian Marksmanship Program. *See* § 1613, Tit. XVI, 104 P.L. 106, 110 Stat. 186 (1996). "All US citizens 16 years of age or older," without any requirement of club membership, may enter DCM matches. 32 C.F.R. § 544.30(a), (b). Moreover, all rifle ranges built with federal funds are open to all persons without any club-membership requirement. 10 U.S.C. § 4309(a).

No nexus exists between club membership and competitions. A competitor need not be in a club, and a club need not sponsor competitions or even have a range.

The First Amendment encompasses the right to "associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." *Roberts v. United States*, 468 U.S. 609, 622-23 (1984). "Freedom of association . . . plainly presupposes a freedom not to associate." *Boy Scouts of America v. Dale*, 120 S. Ct. 2446, 2451 (2000). "To determine whether a group is protected by the First Amendment's expressive associational right, we must determine whether the group engages in 'expressive association.' The First Amendment's protection of expressive association is not reserved for advocacy groups." *Id.* Through their association with the NRA, gun clubs engage in advocacy. Further, gun clubs are much like the Boy Scouts in the following respects:

> The Boy Scouts seeks to instill these values by having its adult leaders spend time with the youth members, instructing and engaging them in activities like camping, archery, and fishing. . . . It seems indisputable that an association that seeks to transmit such a system of values engages in expressive activity. See *Roberts, supra*, at 636 (O'Connor, J., concurring) ("Even the

> training of outdoor survival skills . . . might become expressive when the activity is intended to develop good morals, reverence, patriotism, and a desire for self-improvement").[25]

Id. at 2452.

The Act violates freedom of association not only by compelling membership in a gun club, but also by requiring a registrant to report such membership. "State action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny." *NAACP v. Alabama*, 357 U.S. 449, 460-61 (1958) (invalidating compelled disclosure of memberships).

Gavett v. Alexander, 477 F.Supp. 1035, 1044-45 (D. D.C. 1979), found a law requiring NRA membership for purchase of a military rifle from the government to be violative of free association and equal protection. While the law's purpose was to promote marksmanship, "it is obviously possible to become a competent marksman on an individual basis" and "outside an organizational framework." *Id.* at 1048. The NRA membership requirement did not even pass the rational basis test. *Id.* at 1044-45, 1049. The question in *Gavett* was the same as here: "is the requirement of NRA membership 'the means least restrictive' of First Amendment freedoms to achieve the government's legitimate end? The answer to that question must clearly be in the negative." *Id.* at 1046.

The fact that the gun clubs are by definition private makes the requirement all the more suspect. "Compelled support of private association is fundamentally different from compelled support of government." *Abood v. Detroit Board of Education*, 431 U.S. 209, 259 n.13 (1977) (Powell, J., concurring).

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[25] The Court could have also listed Scout programs at gun clubs. *E.g., Di Cosala v. Kay*, 91 N.J. 159, 450 A.2d 508, 512 n.4 (1982) (Boy Scout rifle range rule requiring presence of NRA member).

Moreover, the Act irrationally discriminates in favor of gun club members and against non-members who owned the same type of property before the enactment. This discrimination deprives citizens of the equal protection of the laws.

Hetherton v. Sears, Roebuck & Co., 652 F.2d 1152, 1157-58 (3rd Cir. 1981), invalidated a law requiring firearm purchasers to be identified by two freeholders, on the basis that a state cannot "arbitrarily establish categories of persons who can or cannot buy the weapons. Clearly, Delaware could not limit the sale of firearms to men only or to members of certain religious groups." Many responsible citizens do not own real estate, *id.* at 1158, just as here many responsible citizens are not gun club members. "To limit the options of prospective purchasers for guns to a requirement that only people who own real estate can identify the purchasers is not more constitutionally permissible than a requirement that only Catholics or Blacks or Indians can identify purchasers of handguns." *Id.* at 1160.

Similarly, typical club rules require a non-member to be sponsored by club members and voted in by the membership.[26] Some persons did not join clubs here because of inability to be endorsed by members. Cir. App. 162a-163a. Ability to register an assault firearm was thus predicated, similar to *Heatherton*, on having been endorsed by others.

Sklar v. Byrne, 727 F.2d 633, 635 & n.2 (7th Cir. 1984), upheld a handgun prohibition with an exception for handguns registered before the effective date. The grandfather clause was held rational because its purpose was "the protection of the reliance interests of those who purchased handguns legally before the effective date of the ordinance." *Id.* at 641.

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[26] *E.g., Concord Rod and Gun Club, Inc. v. Massachusetts Comm. Against Discrimination*, 402 Mass. 716, 719, 524 N.E.2d 1364 (1988).

"The purpose of protecting those who relied on prior laws . . . is a matter of simple fairness. Governments enact laws which invite citizens to invest their money and time and to arrange their affairs in reliance upon those laws." *Id.* at 641-42.

That is the Achilles' heel of the Act here – it irrationally protects the reliance interests of club members and abrogates the equal reliance interests of persons who were not club members. Persons are treated differently based on how they exercised their right to freedom of association. *Sklar* notes: "Where plaintiff can show that a grandfather provision impinges on a fundamental personal right . . ., courts should apply the compelling governmental interest standard." *Id.* at 639.

Invalidating an assault weapon registration scheme, *Peoples Rights Organization*, 152 F.3d 522, noted that the equal protection clause "keeps governmental decisionmakers from treating differently persons who are in all relevant respects alike." *Id.* at 531, quoting *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992). Protecting the reliance interests of all equally would have been proper, but the law irrationally grandfathered only the firearms of those who had registered them under the prior law, which had been declared void. 152 F.3d at 531-32. Unlike federal law, which grandfathered all assault weapons "that were lawfully possessed on the date of the statute's enactment," the grandfather clause failed the rational basis test. "Even in the ordinary equal protection case calling for the most deferential of standards, we insist on knowing the relation between the classification adopted and the object to be attained." *Id.* at 532, quoting *Romer v. Evans*, 517 U.S. 620, 632 (1996).[27]

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[27] *Galioto v. Dept. of the Treasury*, 602 F.Supp. 682 (D. N.J. 1985), *vacated as moot* 477 U.S. 556 (1986), invalidated a federal prohibition which allowed felons, but not ex-mental patients, to have their right to possess a firearm restored. The law classified persons "according to a *past* occurrence in their lives," allowed one class to show capacity for "handling firearms safely in the future," and denied that to the other,

In sum, by irrationally discriminating between persons based on whether they were members of gun clubs by a specified date, the Act deprives non-club members of equal protection of the laws and violates their right to freedom of association.

CONCLUSION

This Court should grant this petition for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Third Circuit.

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similarly-situated class. *Id.* at 689. Here too, the classification is based on an irrelevant past event: club membership on an arbitrarily-specified date.

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 99-5296

COALITION OF NEW JERSEY SPORTSMEN, INC., Holmdel, New Jersey; BOB'S LITTLE SPORTSHOP, INC., Glassboro, New Jersey; SPRINGFIELD, INC., Geneseo, Illinois; ARMALITE, INC., Geneseo, Illinois; ROBERT L. VIDEN, JR., Glassboro, New Jersey; STEPHEN D. MCCLURE; Haddonfield, New Jersey: JOHN DOE I, II, III, IV, V, VI, VII, VIII, and IX, all residents of New Jersey,

Appellants

v.

CHRISTINE T. WHITMAN, GOVERNOR, State of New Jersey; DEBORAH T. PORITZ, Attorney General, State of New Jersey; HARRIS Y. COTTON, Prosecutor of Gloucester County, New Jersey; PATRICIA KUNCHYNSKI, Chief of Glassboro, New Jersey Police Department; CARL WILLIAMS, Colonel, Division of State Police of New Jersey

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On Appeal from the United States District Court
for the District of New Jersey
(D.C. Civil Action No. 96-cv-03037)

District Judge: Honorable Joseph H. Rodriguez

Argued January 18, 2001

Before: ROTH and BARRY, Circuit Judges
SHADUR*, District Judge

(Memorandum Opinion filed: March 21, 2001)

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*Honorable Milton I. Shadur, District Court Judge for the Northern District of Illinois, sitting by designation.

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MEMORANDUM OPINION

ROTH, Circuit Judge:

Plaintiffs brought a pre-enforcement facial challenge to the constitutionality of New Jersey's ban on assault weapons, N.J.S.A. 2C:39-1 et seq. On cross-motions for summary judgment, the District Court granted summary judgment in favor of defendants and against plaintiffs. On appeal, plaintiffs argue that the ban is unconstitutionally vague on its face, that it violate their free speech and free association rights under the First Amendment, and that it violates their Equal Protection rights under the Fourteenth Amendment. Our review is plenary. We find ourselves in substantial agreement with the analysis, reasoning, and conclusions of the District Court and we will affirm largely for the reasons stated in the District Court's opinion. We address (and reject) here several of the issues that the plaintiffs raise on appeal.

First, the District Court applied the appropriate standard in evaluating the claim of facial vagueness. The Court correctly held that, because the statute did not prohibit or implicate any constitutionally protected conduct, the law would be struck down as facially vague only in the plaintiffs can "demonstrate that the law is impermissibly vague in all of its applications." *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 497 (1982); *see also United States v. Salerno*, 481 U.S. 739, 745 (1987); *United States v. Mishra*, 979 F.2d 301, 308-09 (3d Cir. 1992). All the cases on which plaintiffs rely in arguing for a different, less rigid vagueness standard involved statutes that implicated constitutionally protected conduct and therefore could be struck down if vagueness merely "permeates" the statue. *See City of Chicago v. Morales*, 527 U.S. 41, 55 (1999) (plurality opinion); *Kolender v. Lawson*, 461 U.S. 352, 358 (1983).

We reject plaintiffs' argument that these cases support the conclusion that a criminal statute without a scienter requirement must be judged against this lesser standard, even if that statute does not implicate constitutional rights. We decline to follow the Sixth Circuit Court of Appeals in adopting this approach. In our view, the appropriate line for determining which standard to apply to a vagueness challenge is not, as the plaintiffs suggest, whether the statute challenged is civil or criminal; the appropriate line is whether or not the statute prohibits or constrains constitutionally protected conduct or activity. If it does not, as int eh instant case, the stricter standard applies and the law will be struck down as facially vague only if the plaintiff can establish that it is invalid in all situations and that there is no set of circumstances under which it would be valid.

Second, the District Court properly applied that standard to the definitions of assault weapon under the statute, *see* N.J.S.A. 2C:39-1w, concluding that all the definitions at least contained a core meaning and had the one possible constitutional application necessary to survive a facial vagueness challenge. We have some concerns with N.J.S.A. 2C:39-1w(2), which defines assault weapon as any firearm which is "substantially identical" to any firearms, listed by name in N.J.S.A. 2C:39-1w(1). But we still believe the term "substantially identical" has a core sufficient to survive facial challenge, given the strict standard we apply. Because the statute references the named weapons and because photographs of prohibited weapons are available for comparison, an ordinary person of reasonable intelligence would understand, by comparison, what is prohibited as substantially identical.

The legislature presumably used the term "substantially identical" because it needed generalized language that could get around attempts to skirt more specific language. Manufacturers have employed tactics such as adding 1/8-inch to a shot gun barrel in order to place the weapon outside the reach of a statute which prohibited shot guns with a barrel 8 inches or shorter. This minimal increase in the length of the barrel would be sufficient to put the weapon beyond the reach of the statute even though the guns were the same in all essential respects.

The term "substantially identical" also connotes materiality, suggesting that weapons must be the same in some essential way other than color – such as, for example, barrel or handle length, magazine capacity, or type of ammunition used- all of which a reasonable person could understand from a comparison with photographs. We also believe that the Attorney General's Guidelines interpreting the term "substantially identical" (which plaintiffs' counsel conceded at oral argument are not vague) help in avoiding constitutional difficulties, by interpreting substantial identicalness according to specific features, by providing guidance to county prosecutors as to how the term should be interpreted and applied, and by giving notice to the public as to what weapons likely will be the object of prosecution under this provision.

Although the Guidelines are not binding on county prosecutors and therefore not conclusive of our analysis, they do aid us in finding a core of prohibited conduct, such that the term is not vague on its face. We emphasize that we take no position as to whether the term "substantially identical" might be vague in some circumstances or as applied to some weapons. We hold, as the District Court did, only that the term is

constitutional in at least one application and therefore not facially vague.

Third, the District Court properly considered the free speech challenge under the less-restrictive standard applicable to commercial speech restrictions. Plaintiffs urge on appeal that § 2C:39-1w(1), which identified certain prohibited firearms by the manufacturer and model names appearing on the firearms, bans words and therefore is a content-based restriction on speech subject to strict scrutiny. We reject this argument. The words, such as brand name and trademark, appearing on a commercial product ordinarily should be addressed as commercial speech. We believe that when some speech is an advertisement, when it makes reference to a specific product, and when there is an economic motivation for the speech, it strongly supports a conclusion that the particular message should be evaluated as commercial speech. *See Bad Frog Brewery, Inc. v. New York State Liquor Auth.*, 134 F.3d 87, 97 (2d Cir. 1998) (citing *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66-67 (1983).

The ban on weapons containing certain brand and product names should be reviewed as a commercial speech regulation, subject to lesser scrutiny. The District Court correctly applied that test for commercial speech to regulation, subject to lesser scrutiny. The District Court correctly applied that test for commercial speech to the restriction at issue in holding that the statute was constitutional, that there was a reasonable fit between the use of specific named weapons and the governmental interest in banning assault weapons, and that the restriction on words was no more extensive than necessary to serve that interest.

We will affirm the grant of summary judgment in favor of defendants.

TO THE CLERK:

Please file the foregoing Opinion.

By the Court,

/s/ Jane R. Roth
Circuit Judge

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 99-5296

COALITION OF NEW JERSEY SPORTSMEN, INC., Holmdel, New Jersey; BOB'S LITTLE SPORTSHOP, INC., Glassboro, New Jersey; SPRINGFIELD, INC., Geneseo, Illinois; ARMALITE, INC., Geneseo, Illinois; ROBERT L. VIDEN, JR., Glassboro, New Jersey; STEPHEN D. MCCLURE, Haddonfield, New Jersey: JOHN DOE I, II, III, IV, V, VI, VII, VIII, and IX, all residents of New Jersey,

Appellants

v.

CHRISTINE T. WHITMAN, GOVERNOR, State of New Jersey; DEBORAH T. PORITZ, Attorney General, State of New Jersey; HARRIS Y. COTTON, Prosecutor of Gloucester County, New Jersey; PATRICIA KUNCHYNSKI, Chief of Glassboro, New Jersey Police Department; CARL WILLIAMS, Colonel, Division of State Police of New Jersey

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On Appeal from the United States District Court
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(Memorandum Opinion filed: March 21, 2001)

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*Honorable Milton I. Shadur, District Court Judge for the Northern District of Illinois, sitting by designation.

ORDER

The petition for rehearing *en banc* filed by the appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court *en banc*, the petition for rehearing is denied.

By the Court

_____

Circuit Judge

Dated: April 26, 2001
ch/cc: SPH
GJN
EJM
MJW

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

COALITION OF NEW JERSEY SPORTSMEN, INC., et al.,	)	
	)	Hon. Joseph H. Rodriguez
Plaintiffs,	)	
v.	)	Civil Action No. 96-3037 (JHR)
CHRISTINE TODD WHITMAN, et als.,	)	OPINION
Defendants.	)	

March 31, 1999, Decided

Plaintiffs, the Coalition of New Jersey Sportsmen, Inc., Bob's Little Sportshop, Inc., Springfield, Inc., ArmaLite, Inc., Robert L. Viden, Jr., Stephen D. McClure, and nine other New Jersey residents identified simply as John Does I through IX (collectively "plaintiffs"), bring this action for declaratory judgment and injunctive relief against the Governor of New Jersey, the state's Attorney General[1], Colonel Carl A. Williams of the New Jersey State Police, the Prosecutor of Gloucester County as prosecutor, and the Chief of Police of the Glassboro

[1] Although Deborah T. Poritz, former New Jersey Attorney General, was originally named as a defendant, pursuant to Fed. R. Civ. P. 25(d)(1), Peter Verniero is automatically substituted in her place.

Police Department in New Jersey ("collectively "Defendants")[2]. At issue is New Jersey's assault weapons law, passed and signed into law in 1991, and now codified at N.J.S.A. 2C:39-1 et seq.

Plaintiffs raise the following federal constitutional challenges to this state law: (1) it is unconstitutionally vague, and thus void (Counts III, V, VIII, X, XI, and XIV); (2) it violates equal protection (Counts I, II, IV, VI, IX, XII, and XIII); (3) it violates their rights to free association (Count I); (4) it infringes on their right to free speech (Count IV); and (5) it constitutes a bill of attainder (Count VII). The complaint also seeks a declaratory judgment that certain firearms are not "assault firearms" within the meaning of the statute, and that plaintiffs who register their weapons and possess "large capacity ammunition magazines" are not required under N.J.S.A. 2C:39-3j to actually participate in competitive shooting matches sanctioned by the Director of Civilian Marksmanship.

This matter is now before the court on motions for summary judgment filed by both plaintiffs and defendants. For the reasons set forth below, plaintiffs' motion for summary judgment is denied, and defendants' motion is granted.

FACTUAL BACKGROUND

On May 17, 1990, the New Jersey Legislature passed a bill restricting the possession, sale, and transport of "assault firearms" and "large capacity ammunition magazines." L. 1990, c. 32. Governor James Florio signed the bill into law on May 30, 1990, N.J.S.A. 2C:39-1 et seq. (the "Act"), saying at the

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[2] The last two defendants responded to the complaint's allegations by writing, files no response as has no independent information, knowledge or belief of the truth of the allegations or statements made so is incapable or admitting or denying." (See Answers of 7/25/97 & 8/7/97).

time, "these are weapons of war designed to kill as many people as possible in the least amount of time. They have no place on our streets, where too often our police find themselves outgunned." N.J. Lawmakers Approve Nation's Toughest Ban on Assault Weapons, L.A. TIMES, May 18, 1990, at 4.

Beyond the obvious objective of removing assault weapons from New Jersey streets and from the hands of criminals, the rationale for this law can also be found in then Attorney General Robert Del Tufo's testimony concerning Senate Bill 166. Testifying before the Senate Judiciary Committee on March 12, 1990, the Attorney General explained that the intent of the law did not touch upon any firearms used for legitimate hunting or target shooting purposes. Rather, the law would only prohibit semi-automatic (i.e., self-loading) shotguns with excessive magazine capacities, or with other prohibited characteristics such as a pistol grip designed for hand-held firing. According to this testimony, "any person who possesses a shotgun with a magazine capacity of more than 5 rounds intends to hunt something other than game." (Plaintiffs' Exh. 18, Del Tufo Testimony).[3]

New Jersey's gun control statute accomplishes its prohibition by defining the term "assault firearm" to include five separate categories of firearms: (1) certain firearms listed by make and model, series or type; (2) "any firearm manufactured under any designation which is substantially identical to any of

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[3] Although the law that ultimately passed differed as to definitions from the Senate bill upon which the Attorney General was testifying, the rationale of the prohibitions cannot be said to differ between the two.

the firearms listed above"; (3) a semi-automatic[4] shotgun with either a magazine capacity exceeding six rounds, a pistol grip[5], or a folding stock; (4) a semi-automatic rifle with a fixed magazine capacity exceeding 15 rounds; and (5) "a part or combination of parts designed or intended to convert a firearm into an assault firearm, or any combination of parts from which an assault firearm may be readily assembled if those parts are in the possession or under the control of the same person." N.J.S.A. 2C:39-1w(1-5).

Under the statute, any person who knowingly has in his possession such a firearm is guilty of a third degree crime[6], unless certain very narrow exceptions apply. N.J.S.A. 2C:39-5(f). Possession of large capacity ammunition magazines[7] is also prohibited, subject to some of the same exceptions. N.J.S.A. 2C:39-3j. Exceptions to the general prohibition include if a weapon is among the types certified by the Attorney General as a 'legitimate' target-shooting firearm and the owner

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[4] "Semi-automatic" means a firearm which fires a single projectile for each single pull of the trigger and is self-reloading or automatically chambers a round, cartridge, or bullet. N.J.S.A. 2C:39-1(x).

[5] "Pistol grip" means a well-defined handle, similar to that found on a handgun, that protrudes conspicuously beneath the action of the weapon, and which permits the shotgun to be held and fired with one hand. N.J.S.A. 2C:39-1(z).

[6] Third degree crime convictions carry with them a sentence of imprisonment of between three and five years. N.J.S.A. 2C:43-6a(3).

[7] "Large capacity ammunition magazine" means a box, drum, tube or other container which is capable of holding more than 15 rounds of ammunition to be fed continuously and directly therefrom into a semi-automatic firearm.

has registered the weapon with the state and proven his or her membership in a valid rifle or pistol club, see N.J.S.A. 2C:58-12, or if the weapon has been rendered permanently inoperable, see N.J.S.A 2C:58-5, 13. There are also exemptions within the law for certain government employees, such as member of the Armed Forces and federal law enforcement officials. N.J.S.A. 2C:39-6. A one-year grace period was provided for individuals who currently owned prohibited weapons to comply with the law or surrender the firearm. N.J.S.A. 2C:58-13. There was no grandfather clause for those individuals who legally possessed assault weapons at the time this law was enacted.

The law's prohibitions extend beyond merely possessing such weapons; the challenged law also provides that "any person who manufactures, causes to be manufactured, transports, ships, sells or disposes of an assault firearm without being registered or licensed to do so pursuant to N.J.S.2C:58-1 *et seq.* is guilty of a crime of the third degree." N.J.S.A. 2C:39-9g.

The law also touches upon the civil liability of individuals who legally possess assault weapons that are later used in the commission of a crime. Under N.J.S.A. 2C:58-5(h), if a registered assault firearm is used in a crime, "the holder of the license for that assault firearm shall be civilly liable for any damages resulting from that crime." An exemption from liability applies if the weapon was stolen and reported within 24 hours of discovering such theft. N.J.S.A. 2C:58-5(h). Presumably this provision in the law discourages individuals from owning assault firearms, or it at least encourages quick reporting of theft.

The gravamen of plaintiffs' complaint can be found in their brief in the following paragraph:

> Plaintiffs cannot determine whether they possess "assault firearms" or "large capacity ammunition magazines" because those terms are vague. They are threatened with prosecution if they possess firearms and magazines in New Jersey, and incur costs and are deprived of their use when stored outside of New Jersey. Plaintiffs who were not members of a club could not register assault firearms the Attorney General labeled "legitimate." Plaintiffs ArmaLite, Springfield, and Bob's Little Sportshop have lost profits because they cannot market numerous firearms in New Jersey.

(Plaintiffs' Br., 7/24/98, at 3).

Based on these and other allegations, plaintiffs filed suit on June 28, 1996, asserting as grounds for the action 28 U.S.C. §§ 2201, 2202 and 42 U.S.C. §§ 1983 and 1988, and the United States Constitution. Defendants first filed a pre-Answer motion urging this court to abstain from deciding state law questions under the doctrine of Pullman abstention. In the alternative, defendants sought dismissal or summary judgment. Plaintiffs responded by filing a cross-motion to stay defendants' motion for summary judgment.

In an Order entered on June 24, 1997, this court denied defendants' motion for abstention, finding instead that defendants demonstrated only one of three circumstances which might have counseled for Pullman abstention. See Order dated June 24, 1997. The court also denied defendants' motion to dismiss or for summary judgment, and accordingly held that plaintiffs' motion to stay summary judgment was moot. After further discovery ensued, both sides filed these motions for summary judgment. This court has jurisdiction over this action under 28 U.S.C. §§ 1331 and 1343.

STANDARD OF REVIEW

The entry of summary judgment is appropriate only when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). An issue is "genuine" if it is supported by evidence such that a reasonable jury could return a verdict in the non-moving party's favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986). A fact is "material" if, under the governing substantive law, a dispute about it might affect the outcome of the suit. *Id.* In determining whether a genuine issue of material fact exists, the court must view the facts and all reasonable inferences drawn from those facts in the light most favorable to the non-moving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986).

The moving party has the initial burden of demonstrating the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986). Once the moving party has met its opening burden, the non-moving party must identify, by affidavits or otherwise, specific facts showing that there is a genuine issue for trial. *Id.* at 324. The non-moving party may not rest upon the mere allegations or denials of its pleading. *Id.*; *Maidenbaum v. Bally's Park Place, Inc.*, 870 F. Supp. 1254, 1258 (D.N.J. 1994). "The plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex, 477 U.S. at 322.

However, in deciding the motion, the court does not "weigh the evidence and determine the truth of the matter, but [instead] determine[s] whether there is a genuine issue for trial." Anderson, 477 U.S. at 248. If the non-movant has provided evidence exceeding the "mere scintilla" threshold in demonstrating a genuine issue of material fact, the court cannot weigh the evidence and credit the movant's interpretation of the evidence. This is so even if the movant's evidence far outweighs the non-movant's evidence. Credibility determinations are the province of the factfinder. *Big Apple v. BMW of North America*, 974 F.2d 1358, 1363 (3d Cir. 1992), cert. denied, 507 U.S. 912, 113 S. Ct. 1262, 122 L. Ed. 2d 659 (1993).

DISCUSSION

A. JURISDICTIONAL ISSUES

Defendants first contend that the Eleventh Amendment and abstention doctrines[8] requires this court to stay this action to permit state court resolution of disputed interpretations of this assault weapons ban. In particular, defendants allege that there are at least 17 different issues of state law, the resolution of which would obviate or at least impact the federal analyses necessary under this federal constitutional challenge to this New

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[8] Defendants revisit the Pullman abstention issue which this court decided against them in the previous Order issued in this case. Defendants now claim that "the defense of sovereign immunity corrects the two Pullman deficiencies that this Court found in defendants' earlier motion." (Defendants' Br. p. 8). In other words, defendants argue that "this Court no longer has discretion" because unlike the normal Pullman context "the Eleventh Amendment and the Pennhurst doctrine are alternative bases for Pullman abstention ...." (*Id.* at 13).

Jersey law.[9] According to the defendants, plaintiffs seek from this court 'binding' constructions on matters of state law. This, according to the defendants, is prohibited by the Eleventh Amendment as construed by the Supreme Court in Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89, 104 S. Ct. 900, 79 L. Ed. 2d 67 (1983)("*Pennhurst II*").

In *Pennhurst II*, the Supreme Court held that the Eleventh Amendment bars federal injunctive relief against a state official if (1) "'the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration,' or if the effect of the judgment would be to 'restrain the Government from acting, or to compel it to act,'" 465 U.S. at 101 n.11, 104 S. Ct. at 908 n.11 (*quoting Dugan v. Rank*, 372 U.S. 609, 620, 83 S. Ct. 999, 1006, 10 L. Ed. 2d 15 (1963)), and if (2) the conduct to be restrained is within the scope of authority delegated to the official by state law, *see id.* 465 U.S. at 102, 104 S. Ct. at 909. The suit in *Pennhurst II* was barred because it involved a pendent claim against state agencies and officers seeking prospective injunctive relief for a violation of state law:

> In such a case the entire basis for the doctrine of *Young* and *Edelman* disappears. A federal court's grant of

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[9] These 17 state-law issues are listed in ¶ 43 of Defendants' Statement of Material Facts, submitted in accordance with Local Civil Rule 56.1. In general, these statements note the defendants' and plaintiffs' contrasting interpretations of different portions of the statute, and then individual paragraphs conclude with the following or very similar boilerplate language: "If defendants [or plaintiffs] are correct, their state-law construction will substantially narrow plaintiffs' federal claim that the alleged absence of this requirement is unconstitutionally irrational and violative of plaintiffs' rights . . .." (Defendants' Material Facts, ¶ 43(A)).

> relief against state officials on the basis of state law, whether prospective or retroactive, does not vindicate the supreme authority of federal law. On the contrary, it is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law. Such a result conflicts directly with the principles of federalism that underlie the Eleventh Amendment.

Id. at 106, 104 S. Ct. at 911.

Defendants seek to characterize plaintiffs' causes of action as arising under state law. This characterization is designed presumably to strengthen the case for abstention based on the presentation of a *Pennhurst II*-type action. Nonetheless, this clearly is a mischaracterization of this action.

Every count of plaintiffs' complaint alleges violations under the United States Constitution, actionable under 42 U.S.C. § 1983. Federal jurisdiction over this claim was based on the existence of a federal question, not, as in *Pennhurst II*, on principles of pendent jurisdiction. While the resolution of these constitutional issues necessarily requires this court to ascertain what state law means, this is a far cry from a prohibited *Pennhurst II*-type action which seeks injunctive relief on the basis of state law. The Third Circuit was presented with, and soundly rejected, a similar argument in the case of *Everett v. Schramm*, where the Court instructed as follows:

> Though it is true that [deciding the case] required the district court to ascertain what the standard of need was under Delaware law, ascertaining state law is a far cry from compelling state officials to comply with it. The ascertainment of state law is an everyday function of the federal court, in cases ranging from those falling within

> our diversity or pendent jurisdiction, to those brought under section 1983 which claim deprivation of a state-created property right. Indeed, section 1983 would be rendered almost nugatory if federal courts are prohibited, by the eleventh amendment, from deciding matters of state law in cases brought against state officials.

772 F.2d 1114, 1119 (3d. Cir. 1985); *see also Piecknick v. Commonwealth of Pennsylvania*, 36 F.3d 1250, 1255 n.7 (3d. Cir. 1994)("*Pennhurst II* did not address the Eleventh Amendment's bar of suits against state officials in federal court when the claims are based on deprivation of federal constitutional or statutory rights."); *Barnes v. Cohen*, 749 F.2d 1009, 1018 (3d. Cir. 1984).

Nothing in the Pennhurst II case and its interpretation of the Eleventh Amendment causes this court to rethink its Order not to stay this action pending state court resolution of related issues. Accordingly, this court will proceed to decide whether or not portions of the disputed statute violate the Federal Constitution.[10]

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[10] Defendants have not challenged any of the plaintiffs' standing to bring this case, or the ripeness of this action. Of course, Article III, section 2 of the Constitution limits federal jurisdiction to actual "cases" and "controversies," U.S. Const. Art. III, 2, and since this is a jurisdictional requirement, it cannot be waived. To have standing, a litigant must have suffered an injury-in-fact that is fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed with the requested relief. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992); *Allen v. Wright*, 468 U.S. 737, 751, 104 S. Ct. 3315, 82 L. Ed. 2d 556 (1984). Organizations can also have standing if they satisfy three requirements. *See Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333, 343, 97 S. Ct. 2434, 53 L. Ed. 2d 383 (1977).

Although the relief sought here is pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201(a),

> [t]he difference between an abstract question and a "controversy" ... is necessarily one of degree, and it would be difficult, if it would be possible, to fashion a precise test for determining in every case whether there is such a controversy. Basically, the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.

Armstrong World Indus., Inc. v. Adams, 961 F.2d 405, 410 (3d Cir. 1994)(quoting Maryland *Casualty Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 273, 61 S. Ct. 510, 512, 85 L. Ed. 826 (1941).

Because of the timing of when a declaratory judgment is sought, that is, before an injury is necessarily established, there is an inherent tension between declaratory judgments and the concept of ripeness, which is another prerequisite of Article III jurisdiction. *Presbytery of N.J. of Orthodox Presbyterian Church v. Florio*, 40 F.3d 1454, 1463 (3d Cir.1994)(noting that ripeness is properly understood as involving a question of when a party may seek pre-enforcement review of a statute or regulation)(citation omitted). To discern the ripeness of declaratory judgment actions the Third Circuit has held that a court should look to the following three factors, among others: (1) the adversity of interest between the parties; (2) the conclusiveness of a judicial judgment; and (3) the practical help, or utility, of a judgment. *Pic-A-State Pa Inc. v. Reno*, 76 F.3d 1294, 1298 (3d. Cir. 1996).

While the court felt it necessary to address these jurisdictional prerequisites, the court concludes that the plaintiffs have standing and that the present controversy is ripe for review. The weapons manufacturers and sellers which challenge the law are clearly economically affected by the law already. *See National Rifle Ass'n of America v. Magaw*, 132 F.3d 272,

B. VAGUENESS

Plaintiffs primary allegation is that several aspects of the assault firearms ban are unconstitutionally vague and thus should be struck down by this court. Specifically, in Count III of the complaint the term "assault firearm" and components of

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280-84. The individually named plaintiffs also have standing because each is a weapons owner who wishes to engage in, or already is engaging in, conduct prohibited under the statute. Such individuals are in a bind with the assault weapons they now own; they can either illegally possess such weapons in New Jersey, or store them outside the state at financial costs and the loss of their use. Their membership in the organization, as well as the interests which are germane to it are sufficient for standing purposes. Moreover, on the face of the complaint, defendants' answer, and additional affidavits submitted, it is clear to this court that the alleged future harm is "real and substantial," or of "sufficient immediacy and reality." Presbytery, 40 F.3d at 1463; Armstrong, 961 F.2d at 412. While the named plaintiffs may not have been prosecuted yet for any violations under the statute, and indeed they may never be, the defendants insist that the disputed statute is and will continue to be enforced. See Presbytery, 40 F.3d 1454, 1463-68 (3d Cir.1994)(failure of state to disavow intent to prosecute sufficient to create adversity between the parties). Furthermore, this case involves primarily legal questions, where the need for 'concrete' facts necessary to the conclusiveness inquiry is not as strong as often required to make a controversy ripe. Predominately legal controversies include whether a state or federal statute is constitutional on its face. *Pic-A-State*, 76 F.3d at 1300 (citations omitted). Finally, the parties need this decision to clarify their legal relationships such that the parties can "make responsible decisions about the future." Armstrong, 961 F.2d at 412 (citing Step-Saver, 912 F.2d 643 at 649). This is the case here, where the plaintiffs wish to engage in conduct plainly prohibited on the face of the allegedly unconstitutional statute. *See also Peoples Rights Organization, Inc. v. City of Columbus*, 152 F.3d 522, 528-31 (6th Cir. 1998).

its definition[11] are attacked as both facially vague and vague as applied to particular plaintiffs. (Compl. ¶¶ 48-81). Count V seeks a declaration that ten specific weapons, produced by either the plaintiffs Springfield or ArmaLite, are not "assault firearms," or, in the alternative, that the definition of "assault firearms" is vague as applied to such rifles. (Compl. ¶¶ 90-96). Count VIII attacks the definition of "large capacity ammunition magazine," by opining that "as applied to tubular magazines which may be loaded with different amounts of rounds of ammunition depending on cartridge length, this definition is vague." (Compl. ¶ 111). Count X alleges that the act's prohibition on the possession of large capacity ammunition magazines unless "maintained and used in connection with participation in competitive shooting matches . . ." is vague because there are not standards as to how often one must compete, or what actually qualifies as competition, and because the agency which sanctions qualifying shooting matches no longer exists in the same organizational framework as specified in the Act. (Compl. ¶¶ 119-124). Similarly, plaintiffs seek in Count XI a declaration that weapons previously registered pursuant to the shooting competition exception need not be surrendered if no longer used in competition, or, in the alternative, that this aspect of the law is vague. (Compl. ¶¶ 126-127). Finally, in Count XIV, plaintiffs allege that the term 'inoperable' is vague as applied to the unique circumstances of two plaintiffs, who claim to legally possess (under an exception) an assault firearm, as well as other assault firearms which they

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[11] The plaintiffs allege that the terms 'type,' 'series,' 'substantially identical,' and 'combination of parts,' all of which illuminate what is and is not a prohibited 'assault firearm,' are vague. Furthermore, they take issue with the act's definition (and its component parts) of particular prohibited shotguns, which are prohibited if one is "a semi-automatic shotgun with either a magazine capacity exceeding six rounds, a pistol grip, or a folding stock." N.J.S.A. 2C:39-1w(3).

have rendered 'inoperable.' These plaintiffs question whether they violate the law because they are in 'possession' of weapon components[12] (on the legally-owned weapons) which conceivably could be used to render the inoperable weapons operable. (Compl. ¶¶ 135-140).

The Due Process Clause of the Fourteenth Amendment to the United States Constitution, upon which the plaintiffs rely for this vagueness challenge, can render a statute unconstitutional based on notions of fairness. *Colten v. Kentucky*, 407 U.S. 104, 110, 92 S. Ct. 1953, 1957, 32 L. Ed. 2d 584 (1972). Vague laws offend the assumption that "man is free to steer between lawful and unlawful conduct," and thus "we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Grayned v. Rockford*, 408 U.S. 104, 108, 92 S. Ct. 2294, 2298-99, 33 L. Ed. 2d 222 (1972); see also *Connally v. General Constr. Co.*, 269 U.S. 385, 391, 46 S. Ct. 126, 127, 70 L. Ed. 322 (1926)("[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law."); *Bradley v. Pittsburgh Bd. of Educ.*, 910 F.2d 1172, 1177 (3d Cir. 1990). A second justification for vagueness challenges also exists: to prevent arbitrary and discriminatory enforcement. "A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory applications"

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[12] Under N.J.S.A. 2C:58-13.c, "'inoperable' means that the firearm is altered in such a manner that it cannot be immediately fired and that the owner or possessor of the firearm does not possess or have control over the parts necessary to make the firearm operable." (emphasis added).

Grayned, 408 U.S. at 108-109, 92 S. Ct. at 2298; *Kolender v. Lawson*, 461 U.S. 352, 358, 103 S. Ct. 1855, 1858, 75 L. Ed. 2d 903 (1983).

In the criminal context, vagueness attacks are based on lack of notice, and "they may be overcome in any specific case where reasonable persons would know their conduct puts [them] at risk" of punishment under the statute. *Maynard v. Cartwright*, 486 U.S. 356, 361, 108 S. Ct. 1853, 1857, 100 L. Ed. 2d 372 (1988). Thus, to be constitutional, criminal statutes need only give "fair warning" that certain conduct is prohibited, *Colten*, 407 U.S. at 110, 92 S. Ct. at 1957, and statutes meet this constitutional standard if the language employed conveys a sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices. *United States v. Wise*, 550 F.2d 1180, 1186 (9th Cir.), cert. denied, 434 U.S. 929, 98 S. Ct. 416, 54 L. Ed. 2d 290 (1977). The mere fact that a statute could have been written more precisely does not mean the statute as written is unconstitutionally vague. *United States v. Powell*, 423 U.S. 87, 94, 96 S. Ct. 316, 321, 46 L. Ed. 2d 228 (1975).

1. Facial Vagueness[13]

An initial determination must be made as to whether or not the disputed law touches upon significant constitutionally protected conduct. *See Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494-95, 102 S. Ct. 1186, 1191, 71 L. Ed. 2d 362 (1982). The import of this inquiry is to discern the level of scrutiny to which this law should be

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[13] A "facial" challenge means a claim that the law is "invalid in toto--and therefore incapable of any valid application." *Steffel v. Thompson*, 415 U.S. 452, 474, 94 S. Ct. 1209, 1223, 39 L. Ed. 2d 505 (1974).

subjected on this facial vagueness challenge. Although the complaint seeks to invalidate portions of the law which require membership in gun clubs based on the First Amendment's freedom of association, the void for vagueness arguments center on multiple phrases in the law which do not implicate constitutionally protected conduct. In other words, the alleged vagueness of the law is attacked in a pre-enforcement review action based on due process, not, as in many cases, the First Amendment, which would heighten judicial scrutiny.

Accordingly, the facial vagueness challenge can succeed "only if [plaintiffs] demonstrate that the law is impermissibly vague in all of its applications." Hoffman Estates, 455 U.S. at 495, 497, 102 S. Ct. at 1191-92, 1193. So long as the disputed law encompasses some of the 'core' conduct in which plaintiffs wish to engage, a court will not entertain a facial vagueness challenge to other hypothetical conduct. *Id. See also Richmond Boro Gun Club, Inc. v. City of New York*, 97 F.3d 681, 684 (2d. Cir. 1996)("Plaintiffs could perhaps succeed on a facial vagueness challenge if they could show that the law is impermissibly vague 'in all of its applications.'")(*quoting Hoffman Estates*). [14] Courts will rarely invalidate a statute on its

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[14] This court is aware that Supreme Court jurisprudence has described the doctrine of vagueness and the standards used to evaluate it in varying terms. In *Hoffman Estates*, for example, the Supreme Court upheld a facial challenge to a law which regulated businesses that sold any items that were "designed or marketed for use with illegal cannabis or drugs." 455 U.S. at 491-92, 102 S. Ct. at 1189-90. Just one year later, in *Kolender v. Lawson*, the Supreme Court struck down a facial challenge to a California statute which required individuals to provide "credible and reliable" identification information when stopped by a peace officer in a Terry-type detention. 461 U.S. 352, 355, 103 S. Ct. at 1857, 75 L. Ed. 2d 903 (1983). The differing standards that seemed to apply in these two cases, decided roughly 1 year apart, can be reconciled by the type of

face so long as it provides "minimally fair notice" of what is prohibited. *See* Rotunda & Nowak, Treatise on Constitutional Law: Substance and Procedure, 2nd § 17.8 n. 22.

(a) The Defining of 'Assault Firearms'

Plaintiffs first challenge how the statute defines prohibited assault firearms. The Act prohibits the possession, sale or transport of 'assault firearms,' and weapons come within the purview of this statute in one of four ways. The first way in which weapons are defined as 'assault firearms is by reference to a specific list of prohibited weapons,[15] which plaintiffs

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conduct and penalty which each of the challenged statutes prohibited. In *Hoffman Estates*, the statute was akin to economic (as opposed to constitutional) regulations, and only quasi-criminal, thus scrutiny was less exacting. 455 U.S. at 494-95, 102 S. Ct. at 1191. In *Kolender*, the statute at issue was criminal in nature, and it provided police officers unfettered discretion to stop individuals. Thus, the law implicated First Amendment and freedom of movement concerns, and consequently it was scrutinized more closely. 461 U.S. at 358 n.8, 103 S. Ct. at 1859 n.8. *See also Chapman v. United States*, 500 U.S. 453, 467, 111 S. Ct. 1919, 1929, 114 L. Ed. 2d 524 (1991)("Vagueness claim must be evaluated as the statute is applied to the facts of [the] case" when "First Amendment freedoms are not infringed by the statute.").

[15] Under the statute, "Assault firearm" includes the following firearms:
Algimec AGM1 type
Any shotgun with a revolving cylinder such as the "Street Sweeper" or "Striker 12"
Armalite AR-180 type
Australian Automatic Arms SAR
Avtomat Kalashnikov type semi-automatic firearms
Beretta AR-70 and BM59 semi-automatic firearms

challenge on vagueness grounds. According to the plaintiffs,

Bushmaster Assault Rifle
Calico M-900 Assault carbine and M-900
CETME G3
Chartered Industries of Singapore SR-88 type
Colt AR-15 and CAR-15 series
Daewoo K-1, K-2, Max 1 and Max 2, AR 100 types
Demro TAC-1 carbine type
Encom MP-9 and MP-45 carbine types
FAMAS MAS223 types
FN-FAL, FN-LAR, or FN-FNC type semi-automatic firearms
Franchi SPAS 12 and LAW 12 shotguns
G3SA type
Galil type
Heckler and Koch HK91, HK93, HK94, MP5, PSG-1
Intratec TEC 9 and 22 semi-automatic firearms
M1 carbine type
M14S type
MAC 10, MAC 11, MAC 11-9mm carbine type firearms
PJK M-68 carbine type
Plainfield Machine Company Carbine
Ruger K-Mini-14/5F and Mini-14/5RF
SIG AMT, SIG 550SP, SIG 551SP, SIG PE-57 types
SKS with detachable magazine type
Spectre Auto carbine type
Springfield Armory BM59 and SAR-48 type
Sterling MK-6, MK-7 and SAR-48 types
Steyr A.U.G. semi-automatic firearms
USAS 12 semi-automatic type shotgun
Uzi type semi-automatic firearms
Valmet M62, M71S, M76, or M78 type semi-automatic firearms Weaver Arm Nighthawk.

N.J.S.A. 2C:39-1w(1).

firearm owners do not have notice of what weapons are actually prohibited, because the lists do not correspond exactly to the manufacturer and model specifications actually engraved on the firearms, pursuant to 18 U.S.C. § 923(I) and 27 C.F.R. § 178.92. (Plaintiffs' Exh. 1, Johnson Aff., P 11). Further, several models specified in the statute allegedly do not even exist, or are named in an "inaccurate, oxymoronic, or otherwise vague manner." (*Id.*)[16]

One egregious example of these misnomers is the prohibition on 'Avtomat Kalashnikov type semi-automatic firearms' because, according to the plaintiffs' expert, this listing is not engraved on any existing firearm. Moreover, "numerous semiautomatic rifles have been imported with a cosmetic appearance similar to the above rifle but with redesigned, [Bureau of Alcohol, Tobacco and Firearms]-approved receiver and internal parts, and with markings such as 'AKS' or 'AK-47S'. Other rifles have been imported with a receiver outwardly similar to the above rifle but internal parts redesigned, and with other parts dissimilar to it." (Plaintiffs' Exh. 1, Johnson Aff. ¶¶ 17-18). Confusion arises, according to this expert, because "no expert would ever classify these semiautomatic rifles as 'Avtomat Kalashnikov,' nor would an

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[16] Closely related to these allegations of confusion are plaintiffs' objections to the terms 'type' and 'series' as used in the specific listings. *See* n. 13 supra (listing as a prohibited weapon, for example, the 'ArmaLite AR-180 type'). Plaintiffs' expert claims that the word 'type' is properly applied to only Chinese and/or North Korean firearms, and that Western and Russian firearms are never marked or known as a 'type.' (Plaintiffs' Exh. 1, Johnson Aff., ¶¶ 59-60). The plaintiffs conclude that because the words 'type' and 'series' are not marked on weapons and because weapons are not 'known' as such in the industry, these words render the definitions unconstitutionally vague.

ordinary person have notice that such rifles are considered to be 'Avtomat Kalashnikov.'. (*Id.*)[17]

Plaintiffs arguments as to the antiquated or erroneous listings of prohibited firearms, and their objections to the use of the words 'type' and 'series,' fails to establish that the listings in the Act are vague in light of the standard which this court applies in a facial vagueness challenge. Even accepting as true all of the expert's testimony concerning the misnomers throughout the listings, his analysis of such listing fatally undermines the facial vagueness challenge. In other words, his testimony, while certainly indicative of confusion in their applications to multiple variations on literally thousands of weapons, also confirms that each listing has a 'core' to its content. At the very least, each listing sufficiently puts on notice a person of ordinary intelligence that a weapon he or she possess, may be prohibited by the terms of the list itself, or at least possibly by the 'substantially identical' prohibition of N.J.S.A. 2C:39-1w(2), considered infra.

The example of the 'Avtomat Kalashnikov type semi-automatic firearms' prohibition is demonstrative of each of the challenged listings. Plaintiffs' expert knows, with very few exceptions, [18] that to which each listing refers, at least in very general terms. Likewise, Richard Miller, the Chairman of the Coalition of New Jersey Sportsmen, confirmed that "everyone knows that the 'Avtomat Kalashnikov' is a full automatic

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[17] Plaintiffs also point out similar confusion surrounding 12 other prohibited weapons classifications. (*See* Plaintiffs' Exhs., Johnson Aff., Miller Aff., Viden Aff., Doe III Aff., Doe VIII Aff.)

[18] Plaintiffs' expert does not know if the listings for the Australian Automatic Arms SAR, Demro TAC-1 carbine type, G3 SA, or PJK M-68 carbine type, actually refer to any existing firearms.

machine gun designed by the Russian Michael Kalashnikov." (Plaintiffs' Exh. 2, Miller Aff., ¶ 17). While 'Avtomat Kalashnikov' might not be engraved on any existing weapon, such a listing provides notice to an owner of an 'AK-47S' to at least inquire further. Indeed, the regulation of firearms is hardly new to our society. *See e.g., In re Two Seized Firearms*, 127 N.J. 84, 88, 602 A.2d 728, *cert. denied sub. nom., Sholtis v. New Jersey*, 506 U.S. 823, 113 S. Ct. 75, 121 L. Ed. 2d 40 (1992) (*quoting McIntosh v. Washington*, 395 A.2d 744, 756 (D.C.1978)("Where dangerous or deleterious devices or products are involved, the probability of regulation is so great that anyone who is aware that he is either in possession of or dealing with them must be presumed to be aware of the regulation.")

Similarly, the prohibition on 'Uzi type semi-automatic firearms' has a 'core' to its meaning; Uzi semiautomatic firearms marked Model A and Model B and which were produced at the time of this Act's passage are prohibited. An expert's postulation that a subsequently produced 'Uzi-Eagle' pistol, which is not banned under the Act, renders the original designation vague, ignores the proper analysis applied to this facial challenge. The analysis does not concern whether confusion arises upon the production of similarly-designated weapons. Indeed, the record confirms that the manufacturing of weapons is hardly a static industry, and that weapons manufacturers quickly respond to changes in the law. (*See e.g.*, Defendants' Exh. F, Treasury Study, p. 25)(explaining manufacturer modifications in response to a 1989 federal ban on semiautomatic assault rifles). Rather, the question is whether the statute has at least one valid application.

Nor does the inclusion of the terms 'type' or series' render specific listings vague. In this specific context, these words merely expand upon listings which themselves have a

sufficient 'core' for this vagueness challenge. *See Benjamin v. Bailey*, 234 Conn. 455, 485-86, 662 A.2d 1226, 1241-42 (Conn. 1995)(because the AK-47 and the MAC weapons are identifiable, "the statutory phrases 'AK-47 type' and 'MAC-10, MAC-11 and MAC-11 Carbine type'" are not facially vague). The addition of these words to the 'core' definitions does not eviscerate the 'core;' they simply expand their meanings.[19]

The example of the Uzi listing is again instructive. As plaintiffs' expert essentially concedes in his testimony cited *supra*, the confusion concerning what falls within prohibited 'Uzi type semi-automatic firearms' stems from newly manufactured weapons such as the 'Uzi Eagle' pistol. (Plaintiffs' Exh. 1, Johnson Aff., ¶¶ 55-56). Thus, this vagueness challenge essentially alleges that too many weapons come within such a definition due to the phrase 'type,' which then renders the phrase unconstitutionally vague. This ignores the 'core' which is still there. This court declines to read a statute broadly in order to render it unconstitutional. *See United States v. Edmonds*, 80 F.3d 810, 819 (3d. Cir.), *cert. denied*, 519 U.S. 927, 117 S. Ct. 295, 136 L. Ed. 2d 214 (1996); *United States v. Navarro*, 145 F.3d 580, 589 (3d. Cir. 1998).

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[19] It is also noteworthy that defendants have brought forth some evidence that the use of the word 'type' is not without precedent. An advertisement for an A2 Semi-auto Rifle Kit describes the unassembled kit as an 'A2 AR-15 type,' which undermines plaintiffs' professed confusion concerning the use of this phrase. (Defendants Exh. R, Flahive Aff., 7/24/98). The word 'type' is also utilized to delineate the Treasury Secretary's power to authorize the importation of weapons particularly suitable for sporting purposes. (*See e.g.*, Defendants Exh. F, Treasury Study, p. 6). See also Fresno Rifle and Pistol Club, Inc. v. Van de Kamp, 746 F. Supp. 1415, 1427 Appendix A (E.D.Cal. 1990)(upholding California's assault weapons law which included a listing of specific weapons, such as 'Avtomat Kalashnikovs (AK) series).

Moreover, New Jersey has determined that the example used above, the 'Uzi Eagle' pistol, is not an assault firearm prohibited under state law. (See Plaintiffs' Exh. 2, Letter from Eugene Lewis, dated 1/8/98). This was in response to an inquiry from one of the plaintiffs in this case. Thus, put on notice that an Uzi weapon may be prohibited, this particular plaintiff submitted an inquiry and determined that the weapon was not so prohibited. This belies the notion that the term 'type' lacks any 'core' to at least put citizens on notice of their possible prohibition.

Plaintiffs also attack the phrase 'substantially identical,' contained in N.J.S.A. 2C:39-1w(2), which expands the definition of 'assault firearm' to include a weapon "manufactured under any designation which is substantially identical to any of the firearms listed above." Plaintiffs provide a host of examples demonstrating the confusion surrounding this phrase. For example, John Doe IX owned a Charter Arms AR7 rifle, which the State Police opined was not an assault firearm. Then, in 1994, the same State Police charged him with possession of two assault firearms, one of which was the AR7 rifle. These charges were disposed of through PTI. (Plaintiffs' Exh. 15, Doe IX Aff., ¶¶ 3-4). Other examples are also provided, which tend to show an inconsistent application of the law based on the confusing 'substantially identical' standard used to define what is prohibited. (See Plaintiffs' Exh. 12, Doe VI Aff., Exh. 3, Viden Aff., Exh. 13, Doe VII Aff., Exh. 14, Doe VIII).

Defendants point out that assault weapons by any other name are just as dangerous, and consequently need to be banned. Nonetheless, it is inconceivable that any legislator could list all prohibited weapons, given their sheer numerosity and the ever evolving development of new weapons, often based on old designs. For example, defendants note that an April, 1998 Department of Treasury study found that 39 models

of semiautomatic rifles were based on the AK47 design alone. (Defendants' Exh. F, Treasury Study, p. 2). According to the defendants, facts such as these necessitated the prohibition on "substantially identical" weapons.

The phrase 'substantially identical,' while the subject of much confusion, does not so lack a 'core' such that it should be declared facially vague at this time. Standing alone, the phrase is without meaning. But by reference to the prohibited list of weapons, the prohibited characteristics contained in the other definitions of assault firearms, and just a cursory examination of pictures of prohibited weapons, this court cannot conclude that the law is vague 'in all of its applications.' *See State v. Elrose*, 277 N.J. Super. 548, 556, (App. Div. 1994)(Inoperability provision not vague, in part because "legislative intent can be gleaned by reading statutes in pari materia, and by reviewing related sections as a whole."); *see also State v. Sharkey*, 204 N.J. Super. 192, 198, 497 A.2d 1291, 1294-95 (1985)("It is clear to us that persons of ordinary intelligence would understand this legislation to proscribe the distribution of, or possession or control with the intent to distribute, substances which are represented as, or substantially similar in physical appearance to, controlled dangerous substances. That the Legislature chose not to set forth a detailed listing of all proscribed activity relating to the distribution of look-alike substances, but instead utilized a general approach in describing the illegal conduct, does not render the legislation void for vagueness.")(citations omitted). Significantly, as well, the Attorney General has issued guidelines available to the general public regarding this phrase. (Defendants' Exh. B, Attorney General Guidelines). While the Legislature may not have been perfectly clear in its definitions, the Attorney General negated some of the confusion. A court should consider limiting constructions of the law offered by enforcement agencies. *See Hoffman Estates*, 455 U.S. at 494, 102 S. Ct. at 1191. Under

these circumstances, the phrase 'substantially identical' cannot be said to completely lack a core.

Another definition attacked as vague defines a prohibited 'assault firearm' as "a semi-automatic shotgun with either a magazine capacity exceeding six rounds, a pistol grip, or a folding stock." N.J.S.A. 2C:39-1w(3). The plaintiffs confess confusion from the application of either/or to three prohibited characteristics: "must the shotgun have two or only one of the three characteristics [to be prohibited]?" (Plaintiffs' Br., 7/24/98, p. 32). The reference to 'pistol grips' and its definition as a 'well-defined handle' and 'protruding conspicuously' beneath the action of the weapon, is also criticized for failing to define in inches or degrees what this actually means. Plaintiffs also claim that they have no way of knowing whether, hypothetically, the magazine capacity of the weapons they own could exceed six rounds of non-standard, shorter, shot-gun shells.[20]

These arguments, however, are unavailing and disingenuous. Grammatical inaccuracies like the one alleged here do not make the law vague. It is clear that only one characteristic renders the weapon prohibited. Moreover, a failure to specify in inches what 'well-defined' or 'conspicuously protruding' handles means is irrelevant when a review of pictures of the weapons so obviously portrays what

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[20] For example, in his affidavit, plaintiff John Doe III states the following:

I own a Remington Model 11-87 12 gauge shotgun stamped '2 3/4 or 3" Magnum' which holds 5 or 6 of such shotgun shells, but which could hold more than 6 rounds of shorter, non-standard shotgun shells. I own no such shorter shells.
(Plaintiffs' Exh. 9, John Doe III Aff., P 4).

prohibited characteristics the law was referring to. (*See, e.g.*, Defendants' Exh. Q and T, Weapon's Advertisements; Exh. F, Treasury Study, Exh. 3). The law cannot be vague in all of its applications when it obviously applies to some of these weapons. Moreover, Congress employed much the same terminology itself in federal legislation which then caused manufacturers to alter weapon designs, see 18 U.S.C. § 921(a)(30)(B)(ii), which lends substantial credence to defendants' claim that the definition is not vague in all of its applications. Finally, the possibility of shorter, non-standard shells, which may or may not be in existence for many of the weapons cited by the plaintiffs, is irrelevant when the statute's prohibition clearly encompasses the standard shells intended for the magazine. In other words, the definition is not vague in all of its applications.[21]

With respect to the definition of 'assault firearms,' N.J.S.A. 2C:39-1w(5) includes "any combination of parts from which an assault firearm may be readily assembled." According to the plaintiffs, the terms 'readily' does not inform a person of the time (in hours and minutes) it must take to assemble such an assault firearm, or whether that time is intended for an average person or an expert in such weapons. Moreover, fault is found

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[21] For the same reason, plaintiffs' challenge to the prohibition on rifles with fixed magazine capacities over 15 rounds, and the prohibition on large capacity magazines is also unavailing. Plaintiffs' claims, for instance, that John Doe I and II "have no way of knowing whether their magazines will hold and function with more than 15 rounds of shorter ammunition[,]" (Compl. P 74), and that the statute "as applied to tubular magazines which may be loaded with different amounts of rounds of ammunition depending on cartridge length" is thus vague, is of no consequence in light of the standard applied to this facial vagueness challenge.

in the fact that the legislation does not specify whether "a full machine shop or only common hand tools make the parts capable of being readily assembled." (Plaintiffs' Exh. 1, Johnson Aff. p. 19). The court agrees with plaintiffs' description of the law, but disagrees with the conclusions drawn therefrom.

Plaintiffs cite to *Peoples Rights Organizations v. City of Columbus*, in which a District Court determined that virtually identical language in the City of Columbus' assault weapons ban law was void for vagueness. 925 F. Supp. 1254, 1268-69 (S.D.Ohio 1996). This portion of the District Court's opinion was affirmed by the Sixth Circuit, *Peoples Rights Organization, Inc. v. City of Columbus*, 152 F.3d 522, 538 (6th Cir. 1998)(phrase 'may be readily assembled' does not provide sufficient information to an average person to determine whether a particular combination of parts is within city ordinance's scope), which ultimately found that all definitions of prohibited assault firearms were unconstitutionally vague. *Id.* at 538.

Despite this persuasive authority to the contrary, this court does not find the reasoning employed therein to be persuasive. These courts invalidated Columbus' assault weapons law based upon a heightened standard of review, which this court will not apply in this facial vagueness challenge. For the reasons explained above, this court does not believe that a heightened level of scrutiny should apply to this facial challenge of a criminal law, especially when the statute neither reaches significant constitutionally-protected conduct, nor provides unfettered discretion to "policemen, prosecutors, and juries to pursue their personal predilections." *Kolender*, 461 U.S. at 358, 103 S. Ct. at 1858 (internal citations omitted).

While the record demonstrates difficulties in application, nothing indicates the use of arbitrary, unfettered discretion in

applying the statute. Under these circumstances, the court seeks guidance from the Second Circuit, and its consideration of a similar challenge to New York City's ban on certain assault weapons and ammunition feeding devices. *See Richmond Boro Gun Club, Inc. v. City of New York*, 97 F.3d 681, 684-86 (2d. Cir. 1996)(law not facially vague because "it is obvious in this case that there exist numerous conceivably valid applications of Local Law 78.") Similar to the phrase "designed ... for use with illegal cannabis or drugs," which was upheld by the Supreme Court in the Hoffman Estates case, the disputed phrase here–"any combination of parts from which an assault firearm may be readily assembled"-- is not vague in all of its applications because it would surely apply to an otherwise prohibited weapon which was merely altered by removing a single design feature. That plaintiffs can posit ambiguous applications is again, not the issue. Surely the Legislature, intent on reaching assault weapons which could be altered in minor ways or disassembled to avoid the purview of the other assault weapon definitions, did not have to specify in hours and minutes and with reference to specific tools and degrees of knowledge the parameters of what 'readily assembled' means. The precision in drafting which plaintiffs demand is neither constitutionally required nor perhaps even possible or advisable given the confines of language in which we all operate. "The Constitution does not require impossible standards." *United States v. Petrillo*, 332 U.S. 1, 7, 67 S. Ct. 1538, 1542, 91 L. Ed. 1877 (1947). The issue then is whether the statute completely lacks a core, which plaintiffs have failed in this challenge to demonstrate.

(b) Inoperable Weapons

Plaintiffs also challenge, on vagueness grounds, the constitutionality requirements relating to inoperable weapons. Nonetheless, these challenges fail for much the same reason as

above. This court has no difficulty upholding the provision relating to inoperable weapons. It has a core to its meaning as is evident from John Does IV and V's voluntary compliance with it. (See Defendants' Exh. 10, John Doe IV Aff. P 2; Exh. 11, John Doe V Aff., P 2). Their apprehension of prosecution for legally owning weapons which might have interchangeable parts, and thus render a weapon operable, is misplaced. Without evidence that such prosecutions have happened or are likely to happen, and confident that were they to happen an 'as applied' vagueness challenge would likely be viable against this obscure application of the law, this court concludes that this challenged section is not facially vague.

In conclusion, the challenged sections are not facially vague in all of their applications because the law clearly encompasses at least some of the core conduct in which plaintiffs wish to engage or weapons which plaintiffs wish to or do own. The mere conjecture and hypotheticals that plaintiffs posit with this court as evidence of the vagueness of the statute do not undermine its facial validity. A statute challenged for vagueness does not depend on whether the challengers can posit some obscure and difficult application of the legislation which causes confusion. It is doubtful whether any criminal statute could survive such scrutiny. Indeed, the specific instances and circumstances which plaintiffs point out may suggest difficult applications of the law; but they do not raise these issues as a defense in a criminal prosecution context. The issue then is whether all applications are impermissibly vague. They are not in this case and thus plaintiffs' facial vagueness challenge fails.

2. As Applied Vagueness

The plaintiffs also challenge the law as it applies to their particular circumstances, some of which have been explained in the facial challenge analyzed supra. To determine whether a

statute is unconstitutionally vague as applied, the Supreme Court applies a two-part test: the court must first determine whether the statute "give[s] the person of ordinary intelligence a reasonable opportunity to know what is prohibited" and then consider whether the law "provide[s] explicit standards for those who apply [the law]." *Grayned v. City of Rockford*, 408 U.S. 104, 108, 92 S. Ct. 2294, 2299, 33 L. Ed. 2d 222 (1972)(footnote omitted); *see also Gentile v. State Bar of Nevada*, 501 U.S. 1030, 111 S. Ct. 2720, 2732, 115 L. Ed. 2d 888 (1991); *Hoffman Estates*, 455 U.S. at 498, 102 S. Ct. at 1193. As noted, "the degree of vagueness that the Constitution tolerates--as well as the relative importance of fair notice and fair enforcement--depends in part on the nature of the enactment." *Hoffman Estates*, 455 U.S. at 498, 102 S. Ct. 1186. When criminal penalties are at stake, for instance, a relatively strict test is warranted. *Id.* at 498-99, 102 S. Ct. 1186. Nonetheless, "perhaps the most important factor affecting the clarity that the Constitution demands of a law is whether it threatens to inhibit the exercise of constitutionally protected rights." *Id.* Thus, while the challenged statute at issue here is criminal in nature, the concern over constitutionally protected rights is notably absent in this case.

Another factor this court must consider is whether or not the law contains any scienter requirement, or whether it imposes strict liability. *Id.* at 499, 102 S. Ct. 1186. Indeed, "in the absence of a scienter requirement ... [a] statute is little more than 'a trap for those who act in good faith.'" *Colautti v. Franklin*, 439 U.S. 379, 395, 99 S. Ct. 675, 685, 58 L. Ed. 2d 596 (quoting *United States v. Ragen*, 314 U.S. 513, 524, 62 S. Ct. 374, 86 L. Ed. 383 (1942)).

On the face of the statute, no level of scienter is required for conviction; mere possession or other dispositions of a prohibited weapon or magazine constitutes an offense. At least

one New Jersey court has interpreted a portion of the law as not requiring scienter. *See State v. Pelleteri*, 294 N.J. Super. 330, 683 A.2d 555, 556 (1996)(proof that defendant knew shotgun was prohibited under the law not required for conviction). Still, when evaluating this challenge to a state law, "a federal court must, of course, consider any limiting construction that a state court or enforcement agency has proffered." *Hoffman Estates*, 455 U.S. at 494, 102 S. Ct. at 1191.

The Attorney General offers a more limiting construction, at least with respect to weapons which are prohibited because they are 'substantially identical' to listed weapons. In an August 19, 1996 directive issued to the Director of the Division of Criminal Justice, County Prosecutors, and all Law Enforcement Chief Executives, Attorney General Peter Verniero wrote that "prosecutors and police should remember that an assault firearms offense requires proof that the defendant knows he or she possesses an assault firearm, e.g., that the defendant knows that the firearm is 'substantially identical' to one Attorney General seemingly claims that an element of scienter is required although neither the statute nor the cases interpreting it seemingly require knowledge.

In addition to this Attorney General directive, other guidelines have also been issued attempting to clarify confusing applications of the law. For example, after the law was signed by the Governor, then Attorney General Robert Del Tufo sent a memorandum to all county prosecutors, in an attempt to clarify certain aspects of the law. (Defendants' Exh. D, Memo of 5/29/91). Noted in that memo is N.J.S.A. 2C:39-12, which still permits, even today, one in unlawful possession of an assault firearm to voluntarily surrender such a weapon without fear of criminal prosecution. Also noteworthy was the directive that "New Jersey law protects citizens who, in good faith, diligently pursue all means available to comply with the law."

(*Id.* at 2) (citing N.J.S.A. 2C:2-4(c)).

Even prior to that memorandum, however, the Attorney General also issued a determination of which assault firearms were legitimate under the statute for use in competitive shooting matches. The statement included the telephone number to the State Police Firearms Investigation Unit, from which citizens could obtain information. (Defendants' Exh. C, Memo of 8/7/90). This same unit continues to respond to citizen inquiries about assault firearms and also lectures to interested groups. (Defendants' Exh. H, Answers to Interrog. 9). Some of the John Doe plaintiffs used this number or other means in an effort to comply with the law, while others did not. (Defendants' Exhs. I-IX, Answers to Interrog. 2).

It is within this factual background and context that plaintiffs now ask this court to declare this state law unconstitutionally vague as applied to several circumstances particular to individual plaintiffs. This court refuses to do so. The particular disputed matters which plaintiffs raise are best left for the New Jersey courts to decide on an individualized case-by-case basis. Plaintiffs have initiated a pre-enforcement challenge to a state law. While significant constitutional questions were raised and thus addressed with respect to the statute as a whole, and although plaintiffs present enough of a controversy for standing and ripeness requirements, this federal court will exercise its discretion and refrain from attempting to decide this as-applied pre-enforcement challenge which is fraught with speculation. For example, plaintiffs present the case of *State v. Pelleteri*, 294 N.J. Super. 330, 683 A.2d 555, 556 (1996), as evidence of the scienter requirement, and in support of striking down this law as vague. Yet the juxtaposition of this case and the contrasting Attorney General's guidelines militate in favor of abstention.

Refusing to rule on an as-applied challenge to an allegedly vague statute when the ordinance would otherwise be facially valid is not without precedent. *See Richmond Boro Gun Club*, 97 F.3d at 686; *Brache v. County of Westchester*, 658 F.2d 47, 52 (2d Cir.1981), *cert. denied*, 455 U.S. 1005, 71 L. Ed. 2d 874, 102 S. Ct. 1643 (1982). Moreover, this conclusion is based upon principles of judicial restraint, principles that bear some resemblance to the doctrine of abstention. In the Third Circuit, it is still the "salutary rule that courts should avoid whenever possible a premature adjudication that duly enacted legislation is unconstitutional." *NUI Corp. v. Kimmelman*, 765 F.2d 399, 403 (3d Cir. 1985). While wholesale abstention was not appropriate in this case, restraint in this particular area is peculiarly warranted. "The doctrine . . . contemplates that deference to state court adjudication only be made where the issue of state law is uncertain." *Harman v. Forssenius*, 380 U.S. 528, 534, 85 S. Ct. 1177, 1182, 14 L. Ed. 2d 50 (1965). Limiting constructions of the law may render moot what would otherwise be broad pronouncements of state law based on federal constitutional questions.[22] The plaintiffs have not justified such overreaching in this instance. As the Supreme Court instructed recently in Arizonans for *Official English v. Arizona*:

> Warnings against premature adjudication of constitutional questions bear heightened attention when a federal court is asked to invalidate a State's law, for the federal tribunal risks friction-generating error when it endeavors to construe a novel state Act not yet reviewed by the State's highest court. *See Rescue Army*

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[22] Significantly, although certainly not determinative of this issue, declaratory judgment actions are permitted in New Jersey. See N.J.S.A. 2C:16-50 to 2A:16-62. To this court's knowledge, however, such a challenge is not presently pending.

[v. Municipal Court of Los Angeles], 331 U.S. [549,] 573-74, 67 S. Ct. [1409,] 1421-23.

520 U.S. 43, 79, 117 S. Ct. 1055, 1074, 137 L. Ed. 2d 170 (1997). *See also Poe v. Ullman*, 367 U.S.

497, 526, 81 S. Ct. 1752, 1768, 6 L. Ed. 2d 989 (1961)(Harlan, J., dissenting)("Normally this Court ought not to consider the Constitutionality of a state statute in the absence of a controlling interpretation of its meaning and effect by the state courts.").

Plaintiffs' search for binding constructions on particular facets of a New Jersey law will not be supplied by this federal court when the law is, as in this case, facially valid.

C. EQUAL PROTECTION

In Counts II, IV, VI, IX, XII, and XIII, plaintiffs allege that in different ways New Jersey's assault weapons ban violates the equal protection of the laws, guaranteed under the Fourteenth Amendment to the United States Constitution. Plaintiffs brief explicates several instances where the law is allegedly irrational, and thus violates equal protection. For example, Count II appears to allege that because the Attorney General failed to name several weapons which plaintiffs own as 'legitimate' for target shooting purposes, the classifications are violative of due process. Plaintiffs allege in Count IV that banning the use of certain names on products violates equal protection.[23] Count VI claims that banning firearms by reference to specifically named manufacturers, instead of by

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[23] The related complaint based on a violation of free speech is discussed infra.

generic characteristics, is irrational and thus violates equal protection. Count IX attacks the prohibition on large capacity magazines, by alleging that the one exception to this prohibition irrationally discriminates against plaintiffs who are non-registrants but who use the magazines in sanctioned marksmanship matches. Count X claims that the Director of Civilian Marksmanship of the United States Department of the Army, as referenced in the statute, is no longer affiliated with the Army, and thus the statute is impossible to comply with. Finally, counts XII and XIII allege equal protection violations based on the law's exemptions for certain government employees, and based on the civil liability which attaches to owners of registered weapons whose weapons are subsequently used in a crime. These challenges on equal protection grounds, while extensive in scope, are without merit and can be rejected as a matter of law.

The Equal Protection Clause of the Fourteenth Amendment commands that no State shall "deny to any person within its jurisdiction, the equal protection of the laws." In *Nordlinger v. Hahn*, 505 U.S. 1, 10, 112 S. Ct. 2326, 120 L. Ed. 2d 1 (1992), the Supreme Court explained that "the Equal Protection Clause does not forbid classifications. It simply keeps governmental decisionmakers from treating differently persons who are in all relevant respects alike." See also *Vacco v. Quill*, 521 U.S. 793, ---, 117 S. Ct. 2293, 2297, 138 L. Ed. 2d 834 (1997)(the Equal Protection Clause "embodies a general rule that States must treat like cases alike"). If legislation neither burdens a fundamental constitutional right nor targets a suspect classification, it will withstand constitutional scrutiny so long as it bears a rational relationship to a legitimate state interest. *Id.* at ---, 117 S. Ct. at 2297, 138 L. Ed. 2d 834 (1997); *Romer v. Evans*, 517 U.S. 620, 631, 116 S. Ct. 1620, 134 L. Ed. 2d 855 (1996).

In this case, none of the alleged violations of equal protection violate a fundamental right or burden a suspect class. See e.g., San Antonio School Dist., 411 U.S. 1, 28, 93 S. Ct. 1278, 1294, 36 L. Ed. 2d 16, reh'd denied, 411 U.S. 959, 93 S. Ct. 1919, 36 L. Ed. 2d 418 (1973)("The system of alleged discrimination and the class it defines have none of the traditional indicia of suspectness"); *id.* at 33-35, 93 S. Ct. at 1296-1298 (courts must look to the Constitution, not the "importance" of the asserted right, when deciding whether an asserted right is "fundamental"). There is no fundamental right to weapon ownership here, and the plaintiffs in this case (weapon owners, manufacturers and sellers) are not a suspect class. Accordingly, rational basis review is warranted, and the challenged legislation is constitutionally permissible so long as it bears a rational relationship to a legitimate state interest. The law is also entitled to a "strong presumption of validity." *Heller v. Doe*, 509 U.S. 312, 319, 113 S. Ct. 2637, 2642, 125 L. Ed. 2d 257 (1993).

The issue for this court then is not whether New Jersey can justify its enactment of the assault weapons ban and how that ban is effected; indeed "the burden [of proof] is on the one attacking the legislative arrangement to negative every conceivable basis which might support it." *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364, 93 S. Ct. 1001, 1006, 35 L. Ed. 2d 351 (1973)(internal quotation marks omitted). This is the case even if the rational basis for the law has no foundation in the record. *Heller*, 509 U.S. at 320-21, 113 S. Ct. at 2643, 125 L. Ed. 2d 257.

While rational basis review is highly deferential, it is not "toothless." *Mathews v. Lucas*, 427 U.S. 495, 510, 96 S. Ct. 2755, 49 L. Ed. 2d 651 (1976). "Even in the ordinary equal protection case calling for the most deferential of standards, we insist on knowing the relation between the classification adopted

and the object to be attained. The search for the link between classification and objective gives substance to the Equal Protection Clause." Evans, 517 U.S. at 632, 116 S. Ct. 1620.

Despite the alleged problems with the drafting of the assault weapons ban at issue here, plaintiffs cannot meet their heavy burden in showing that this law bears no rational relationship to a legitimate state interest. Clearly, and plaintiffs do not seriously dispute this, the government has a legitimate state interest in the regulation of assault weapons. It was estimated that as of ten years ago, in 1989, Americans owned approximately 1 million assault rifles. Keith R. Fafarman, *State Assault Rifle Bans and the Militia Clauses of the United States Constitution*, 67 Ind. L.J. 187, 189-90 (1991). The numbers of such weapons sought to be imported into this country has grown approximately tenfold over the last decade, to over 1,000,000 in October of 1997. *See Richmond Boro Gun Club*, 896 F. Supp. 276 at 283; Defendants' Exh. F. Treasury Study at 1, n.1. Such weapons are considered the weapons of choice for drug traffickers, violent offenders and members of organized crime. *See* Defendants' Exh. E, 5/9/91, Testimony of Col. Dintino at 22; *Richmond Boro Gun Club*, 896 F. Supp. at 282-83; Defendants' Exh. F, Treasury Study, at 3, 30-31. Many of these weapons fall into criminal hands when stolen from legitimate owners. Defendants' Exh. E, 5/9/91, Testimony of Winter, at 38).

The rational link between public safety and a law proscribing possession of assault weapons is so obvious that it would seem to merit little serious discussion. Still, it is particular aspects of the law which plaintiffs allege are irrational. For example, in their brief, plaintiffs' claim that "the Attorney General arbitrarily failed to name plaintiffs' firearms, all of which are lawful for target shooting. ... Many of these firearms are superior in accuracy and range than the M1 carbine,

which shoots an inaccurate cartridge." (Plaintiffs' Br., 7/24/98, at 37). Nonetheless, what plaintiffs point out, however, does not establish an equal protection violation. At most, plaintiffs point out that the Attorney General should have named more weapons to the 'legitimate' list. But mere underinclusiveness is not actionable. *Katzenbach v. Morgan*, 384 U.S. 641, 657, 86 S. Ct. 1717, 1727, 16 L. Ed. 2d 828 (1966)("[A] statute is not invalid under the constitution because it might have gone farther than it did [and] reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind."). Moreover, in so far as plaintiffs' complaint attempts to allege equal protection violations based on disparate classifications of similar weapons, such a claim is not cognizable. The equal protection clause applies only to persons, not products. U.S. Const., amend. XIV, P 1.

A similar analysis controls plaintiffs complaints that the ban on large capacity magazines, which applies to everyone except those who register weapons and use the magazines in competitive shooting matches, violates equal protection. Despite the fact that a registrant may possess unlimited quantities of large capacity magazines while a non-registrant is prohibited from possessing any, there is a rational connection between conditioning possession of such magazines on participation with otherwise banned assault firearms in shooting competitions. The rational link between the two is sufficient for this review. Courts are compelled under rational-basis review to accept a legislature's generalizations even when there is an imperfect fit between means and ends. A classification does not fail because it "'is not made with mathematical nicety or because in practice it results in some inequality.'" *Dandridge v. Williams*, 397 U.S. 471, 485, 90 S. Ct.1153, 1161, 25 L. Ed. 2d 491 (1970)(quoting *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78, 31 S. Ct. 337, 340, 55 L. Ed. 369 (1911)).

A rational link also exists for each of the other challenged facets of the Act. For example, participation in sanctioned shooting competitions is rationally related to maintaining large capacity ammunition magazines. The exemptions in this law for, among others, prosecutors, police officers and others authorized to possess other firearms, is likewise rational. The Legislature could have determined, for instance, that such individuals sometimes require such firearms in the performance of their duties. Possession of these weapons might also continue into off-duty hours, thereby necessitating the exemption. Whether or not this is true is irrelevant. It nonetheless is a rational basis for the distinctions. Finally, the civil liability provided for under N.J.S.A. 2C:58-12g is likewise not irrational. While the liability seemingly only attaches to registrants (i.e. those who comply with the law), this underinclusiveness does not constitute an equal protection violation. The Legislature could have concluded that prospective purchasers of legal assault weapons, confronted by the civil liability provision and other registration requirements, would be dissuaded from consummating the purchase. The fact that the law, as written, could have the unintended effect of persuading individuals to not register weapons (and thus face possible criminal sanctions) out of fear for the civil liability provision, does not mean the law is irrational. Refining what is otherwise rational is a legislative, rather than judicial, function. Rational basis review involving an equal protection challenge "is not a license for courts to judge the wisdom, fairness, or logic of legislative choices." *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313, 113 S. Ct. 2096, 2100-2101, 124 L. Ed. 2d 211 (1993). *See, e.g., Dandridge*, 397 U.S. at 486, 90 S. Ct. at 1162.

"The problems of government are practical ones and may justify, if they do not require, rough accommodations--illogical, it may be, and unscientific." *Metropolis Theatre Co.*

v. Chicago, 228 U.S. 61, 69-70, 33 S. Ct. 441, 443, 57 L. Ed. 730 (1913). The judiciary is not authorized to "sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines." *New Orleans v. Dukes*, 427 U.S. 297, 303, 96 S. Ct. 2513, 2517, 49 L. Ed. 2d 511 (1976) (per curiam). Mindful of the judiciary's limited role, this court cannot conclude that the law is irrational and thus violative of equal protection. Accordingly, plaintiffs' motion for summary judgment on Counts II, IV, VI, IX, XII, and XIII and alleging violations of equal protection is denied. Summary judgment is granted in defendants favor on these equal protection claims.

D. FREEDOM OF ASSOCIATION

In Count I of the complaint, plaintiffs maintain that the Act's requirement of membership in a rifle or pistol club as a condition of keeping operable registered assault weapons and large capacity ammunition magazines violates their freedom of association rights guaranteed under the United States Constitution. Plaintiffs specifically point to N.J.S.A. §§ 2C:58-12b[24] and 2C:39-3j[25] as effectively "preconditioning a

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[24] In pertinent part, N.J.S.A. § 2C:58-12b requires:

b. The owner of an assault firearm purchased on or before May 1, 1990 which is on the list of assault firearms determined by the Attorney General to be legitimate for target-shooting purposes shall have one year from the effective date of P.L.1990, c. 32 (C. 2C:58-12 et al.) to register that firearm. In order to register an assault firearm, the owner shall:

...

(4) Submit valid proof that the person is a member of a rifle or pistol club in existence prior to the effective date of P.L.1990, c. 32 (C. 2C:58-12 et

continued liberty and property right not on lawful ownership of the property before a specified date, but on membership in certain private clubs before a specified date." (Compl. P 38). Plaintiffs support this argument with allegations that less than 5% of the members of currently registered clubs are women, and that noncitizens may not join some of the clubs. Furthermore, many of the registered clubs are affiliated with the National Rifle Association ("NRA") and promote hunting, an organization and an activity which individuals may be loathe to support. Nonetheless, the law as written requires membership in such clubs as a condition of maintaining property and a liberty interest.

This court does not disagree with plaintiffs' general description of the law and its requirement of a rifle or gun club membership, and participation in sanctioned shooting matches, in order to maintain, in operable form, certain assault weapons

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al.). Membership in a rifle or pistol club shall not be considered valid unless the person joined the club no later than 210 days after the effective date of P.L.1990, c. 32 (C. 2C:58-12 et al.) and unless the rifle or pistol club files its charter with the Superintendent no later than 180 days following the effective date of P.L.1990, c. 32 (C. 2C:58-12 et al.). The rifle or pistol club charter shall contain the name and address of the club's headquarters and the name of the club's officers.

[25] N.J.S.A. § 2C:39-3j provides:

j. Any person who knowingly has in his possession a large capacity ammunition magazine is guilty of a crime of the fourth degree unless the person has registered an assault firearm pursuant to section 11 of P.L.1990, c.32 (C. 2C:58-12) and the magazine is maintained and used in connection with participation in competitive shooting matches sanctioned by the Director of Civilian Marksmanship of the United States Department of the Army.

deemed 'legitimate' by the Attorney General. The initial determination for this court, however, is the standard of scrutiny to apply to this provision. The plaintiffs do not address this question straightforward. However, from the citation to numerous cases, it appears they attempt to implicate a fundamental right, and thus argue that a heightened level of scrutiny, such as strict scrutiny, should apply. Defendants on the other hand claim that the membership requirement implicates no First Amendment rights, but that even if it did, the law is still a valid exercise of legislative power.

This court readily acknowledges that among the rights protected by the First Amendment is the freedom of association. NAACP v. Alabama, 357 U.S. 449, 460, 78 S. Ct. 1163, 1170, 2 L. Ed. 2d 1488 (1958). The right to free association is correlative to an individual's right "to speak, to worship, and to petition the government for the redress of grievances." *Roberts v. United States Jaycees*, 468 U.S. 609, 622, 104 S. Ct. 3244, 3252, 82 L. Ed. 2d 462 (1984). The Supreme Court has acknowledged that this right of association also has a necessary corollary; the right of nonassociation. In *Wooley v. Maynard*, the Court explained: "A system which secures the right to proselytize religious, political, and ideological causes must also guarantee the concomitant right to decline to foster such concepts. The right to speak and the right to refrain from speaking are complementary components of the broader concept of "individual freedom of mind." 430 U.S. 705, 714, 97 S. Ct. 1428, 1435, 51 L. Ed. 2d 752 (1977).

Plaintiffs suggest that this right not to associate is infringed by New Jersey's law which makes membership in private gun and rifle clubs a requirement of continued possession of certain assault weapons. In other words, plaintiffs allege that they are being coerced to associate with groups holding views with which they disagree. They liken this case to

Gavett v. Alexander, in which a requirement of NRA membership to purchase, at cost, surplus army rifles was struck down because it violated the First Amendment's implicit right of non-association. 477 F. Supp. 1035, 1049 (D.C.D.C. 1979).

Even though *Gavett* is not controlling on this court, it is nevertheless distinguishable from this case. First, in *Gavett*, the District Court concluded that the NRA membership requirement survived neither a strict scrutiny test (if indeed the law burdened a fundamental right) nor rational basis review. *Id.* at 1049 ("In short, there is no rational basis for the statute and it is invalid even under the less rigid test for determining constitutionality.") Thus, the court did not definitively conclude that NRA membership as a requirement of a government benefit infringed on the fundamental right of non-association. Second, *Gavett* concerned a compelled club membership for the receipt of a governmental benefit--i.e. at cost purchases of surplus weapons which provided a significant monetary savings. *See id.* at 1039 n.5. For the present case to be considered the same, retention of otherwise banned assault weapons and large capacity ammunition magazines must be akin to the privilege of purchasing governmental property at a discount. It is not the same, and this is constitutionally significant.

The former benefit is essentially legislative protection, albeit with conditions, of the ownership and/or reliance interests of assault firearm owners. This is a legitimate governmental interest. *See City of New Orleans v. Dukes*, 427 U.S. 297, 305, 96 S. Ct. 2513, 49 L. Ed. 2d 511 (1976) (upholding a grandfather clause). The latter benefit challenged in the *Gavett* case was not the legitimate protection of a reliance interest; it was an arbitrary and irrational governmental preference for NRA members. The same cannot be said of the challenged statute here, which links retention of certain assault firearms with membership in organizations in which one could actually

use such weapons for a legitimate purpose.

This distinction accords with other cases which have prevented the state from requiring association with a private entity as a prerequisite to receiving public benefits. These rights are quite different than the right to retain functioning assault firearms and large capacity magazines, a right which the Legislature could have abrogated completely. For example, patronage dismissals of public employees because of political affiliation may violate the First Amendment's right to association. See *Branti v. Finkel*, 445 U.S. 507, 100 S. Ct. 1287, 63 L. Ed. 2d 574 (1980); *Elrod v. Burns*, 427 U.S. 347, 96 S. Ct. 2673, 49 L. Ed. 2d 547 (1976). The Supreme Court explained the underlying rationale in *Perry v. Sindermann*:

> [The government] may not deny a benefit to a person on a basis that infringes his constitutionally protected interests, especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited.

408 U.S. 593, 597, 92 S. Ct. 2694, 2697, 33 L. Ed. 2d 570 (1972).

Plaintiffs attempt to fit into this rationale the 'governmental benefit' of retaining otherwise banned assault firearms and large capacity ammunition magazines. But such a benefit, the protection of a reliance interest which need not have been granted, is not akin to employment.

Nor is the association required in this instance necessarily political or infused with beliefs which would be offensive to those wishing to retain certain weapons and

compete in shooting matches. Despite plaintiffs' contentions that individuals did not join clubs for various reasons,[26] the record also reveals that many of these clubs are public in nature, and spread throughout New Jersey (Defendants' Eh. H, Answer to Interrog. 9 and Exh. M). Based on all of these considerations, rational basis review is warranted. See, e.g., Besig v. Dolphin Boating and Swimming Club, 683 F.2d 1271 (9th Cir.1982) (requirement of membership in groups of "apolitical nature" which "advocate no special view or philosophy that appellants have identified as offensive" in order to receive favorable access to public land not in violation of First Amendment).

Having determined that no fundamental right is implicated in the club membership requirement, rational basis review is warranted. Not surprisingly, membership in a sanctioned shooting club as a requirement for maintaining, in

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[26] Richard Miller, Chairman of the Coalition of New Jersey Sportsmen, Inc., explained why some individuals did not and will not join gun clubs:

> some disagreed with the beliefs or principles of a club, including on political issues, conservation issues, or otherwise; some could not afford the membership fees; some did not qualify because they were not acquainted with and thus could not be endorsed by existing members; some did not choose to join a club because they did not wish to be associated with the other members of a specific club; some clubs were filled to capacity and did not have any open membership; and some Coalition members did not reside within a convenient distance of a club.

(Plaintiffs' Exh. 2, Miller Aff., P 10).

operable form, otherwise prohibited assault weapons and large capacity ammunition magazines is rational. While the Legislature clearly intended that the law be broad enough to reach potentially deadly assault weapons, it was equally concerned with preserving the rights of individuals who legitimately use such weapons for shooting competitions. (See Plaintiffs' Exh. 18, Del Tufo Testimony). Thus, the nexus between ownership and shooting competitions is entirely rational. Accordingly, plaintiffs motion for summary judgment on this grounds is denied, while defendants motion is granted.

E. FREEDOM OF SPEECH

Count IV of the complaint contends that the law violates plaintiffs right to free speech. According to the plaintiffs by defining prohibited firearms based on their names, without regard to any generic definition and or the fact that firearms with different features may have a common name, N.J.S. § 2C:39-1w(1) violates the rights to free speech and press of plaintiffs ArmaLite and Springfield, and denies the equal protection of the laws to all plaintiffs, contrary to the First and Fourteenth Amendments to the United States Constitution.

(Compl. P 89). The gravamen of this complaint appears to be that because the challenged statute prohibits certain weapons which were specifically-named in the Act, the ban applies not to specific prohibited characteristics that make the weapons dangerous, but rather to specific words. Springfield and ArmaLite protest that this is a prior-restraint on free speech because each company is limited to what it can name new weapons which may in fact not have any characteristics which this legislation was attempting to prohibit. Indeed, in 1994 a Federal Assault Weapons Law went into effect which caused many weapons manufacturers to reconfigure their products to comply with the new law. Nonetheless, the names on the

weapon remained the same based on the marketing advantage given product name recognition. (See Plaintiffs' Exh. 2, Miller Aff., P 26; Exh. 5, Springfield Inc. Aff., P 12; Exh. 6, ArmaLite Aff., PP 10-11). Thus according to ArmaLite's President, "ArmaLite is discouraged in marketing [a modified ArmaLite AR-180] because of jurisdictions such as New Jersey which prohibit the sale or possession of any firearm with the term "ArmaLite AR-180" stamped on it." (Plaintiffs' Exh. 6, ArmaLite Aff., P 11).

Neither side of this issue squarely addresses the appropriate level of scrutiny to apply to this case. Plaintiffs describe the effect of the ban in an apparent attempt to implicate heightened scrutiny but they conclude that "banning firearms by what is written on them has no rational basis ...." (Plaintiffs' Br., 7/24/98, at 11). Defendants implicitly argue for rational basis review by writing that "the statute bars no speech[,]" but the brief also concludes with an analysis of this case applied to the jurisprudence of commercial speech. (Defendants' Br., 7/24/98, at 46-48). An initial determination then, must be made as to what level of scrutiny should apply.

This court notes that this is not the typical commercial speech case which involves either speech "proposing a commercial transaction," *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 385, 93 S. Ct. 2553, 2558, 37 L. Ed. 2d 669 (1973), or that is "related solely to the economic interests of the speaker and its audience," *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n*, 447 U.S. 557, 100 S. Ct. 2343, 65 L. Ed. 2d 341 (1980). This is not to say that this de facto restriction on certain product names does not implicate First Amendment concerns; it does because in many instances the name of the product can be as alluring a promotion as traditional advertising techniques which, if regulated, clearly would be commercial speech. Nonetheless,

the Act in this case does not prohibit or criminalize the naming itself. The Act simply prohibits specific weapons which the Legislature deemed necessary to list specifically in the statute. Admittedly, the indirect effect of these listings are that manufacturers who wish to engage in business in New Jersey are restricted (in a very minor way) how they can name such a weap n. Erring on the side of caution, this court will scrutinize the disputed Act as if it proscribes commercial speech.[27]

In Central Hudson, the Supreme Court set forth a less protective standard for evaluating the constitutionality of regulations of commercial speech, holding that the Constitution requires only that (1) the state "assert a substantial government interest"; (2) "the regulatory technique be in proportion to that interest"; and (3) the incursion on commercial speech be "designed carefully to achieve the State's goal." 447 U.S. 557, 564, 100 S. Ct. 2343, 2350, 65 L. Ed. 2d 341 (1980).

There is no doubt that the defendants' interest in regulating assault firearms is sufficient to support a suppression

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[27] Interestingly, this case could be removed from the ambit of commercial speech jurisprudence due to the fact that the Act generally bans the listed weapons from New Jersey. In a sense then, plaintiffs wish to commercially express themselves on what could be an illegal transaction. And, of course, communications relating to an unlawful activity are afforded no First Amendment protections. *See Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 96 S. Ct. 1817, 48 L. Ed. 2d 346 (1976)("There is no claim that the transactions proposed in the forbidden advertisements are themselves illegal in any way."); *Nordyke v. Santa Clara County*, 110 F.3d 707, 710 (9th Cir. 1997)(Offer to pay 'hit man' one million dollars accorded no First Amendment protection). Nonetheless, this reasoning appears unduly circular and designed only to avoid reaching the harder analytical questions.

of commercial speech. In light of the evidence of record demonstrating the firepower of such weapons and their relation to crime, the state interest asserted is substantial.

The last two steps of the analysis "basically involve a consideration of the 'fit' between the legislature's ends and the means chosen to accomplish those ends." *Posadas de Puerto Rico Assoc. v. Tourism Co. of Puerto Rico*, 478 U.S. 328, 341, 106 S. Ct. 2968, 2977, 92 L. Ed. 2d 266 (1986). Thus, does this challenged statute and restriction on speech "directly advance" the government's substantial interest? This court believes the answer to this second question is yes. The Legislature obviously believed, and this belief was reasonable, that by listing specific weapons which would be banned in New Jersey would eliminate the most common, and perhaps most popular, firearms from the state. Listing such weapons was a proportionate means of advancing the state's interest.

Finally, the restrictions on speech in this case -- which are minimal to begin with--are designed with enough precision required for such a regulation. In other words, "the restrictions on commercial speech are no more extensive than necessary to serve the government's interest," *Posadas*, 478 U.S. at 343, 106 S. Ct. at 2978, and the government has carried its burden on this issue, *see Edenfield v. Fane*, 507 U.S. 761, 113 S. Ct. 1792, 123 L. Ed. 2d 543 (1993). The record demonstrates the very real harm assault weapons can cause; a ban on some of the most popular weapons can sensibly alleviate the problem. Significantly, it is of little consequence that the restrictive means chosen may not be the "least restrictive means" possible. All that is required is a "reasonable fit" between the legislative end and the means chosen. *See Board of Trustees of State University of New York v. Fox*, 492 U.S. 469, 480, 109 S. Ct. 3028, 3034-35, 106 L. Ed. 2d 388 (1989). This is not a case where the State of New Jersey attempted to ban all

advertisements of assault firearms. Rather, it is a ban on a limited subset of weapons, some of which are specifically named in the statute. Such a means, while perhaps not the least restrictive means possible which could have in turn avoided these free speech questions, was permissible under each prong of the Central Hudson test.

Confined to words as we all are, the legislature was free to designate specific weapons and such designations do not implicate an impermissible restraint on plaintiffs' commercial free speech rights. Under these circumstances, plaintiffs' motion for summary judgment is denied, and defendants' motion on this matter is granted.

F. BILL OF ATTAINDER

In Count VII, plaintiffs final allegation is that N.J.S.A. §§ 2C:39-1w, 5f, and 9g constitute bills of attainder because it is unlawful for Springfield and ArmaLite to sell products they have made while similar "firearms ... manufactured by others may be freely sold and possessed." (Compl. PP 104-107). While it is true that certain models of Springfield and ArmaLite weapons are listed as prohibited weapons, their contentions that this constitutes bills of attainder are clearly without merit.

Art. I § 10 of the United States Constitution provides in pertinent part that "no state shall ... pass any Bill of Attainder ..." In essence, a bill of attainder is "a law that legislatively determines guilt and inflicts punishment upon an identifiable individual without provision of the protections of a judicial trial." *Nixon v. Administrator of General Services*, 433 U.S. 425, 468, 97 S. Ct. 2777, 2803, 53 L. Ed. 2d 867 (1977). A plaintiff challenging a legislative act on the ground that it is an unconstitutional bill of attainder must prove three elements: nonjudicial infliction of punishment; specificity as to the identity

of individuals affected; and lack of a judicial trial. *See* 16B Am.Jur.2d Constitutional Law § 671 (1998). These elements must be established by the "clearest proof." *Communist Party of the United States v. Subversive Activities Control Bd.*, 367 U.S. 1, 83, 81 S. Ct. 1357, 1403, 6 L. Ed. 2d 625 (1960).

The initial question this court must consider is whether or not the legislation constitutes punishment. Three inquiries are normally made to determine whether a statute inflicts punishment that implicates the Constitution: (1) whether the challenged statute falls within the historical meaning of legislative punishment; (2) whether the statute, "viewed in terms of the type and severity of burdens imposed, reasonably can be said to further nonpunitive legislative purposes"; and (3) whether the legislative record "evinces an ... intent to punish." *Selective Serv. Sys. v. Minnesota Pub. Interest Research Group*, 468 U.S. 841, 852, 104 S. Ct. 3348, 3355, 82 L. Ed. 2d 632 (1984) (statute denying federal student aid to males who fail to register for draft does not inflict punishment within meaning of Bill of Attainder Clause) (quoting *Nixon*, 433 U.S. at 473, 475-76, 478, 97 S. Ct. at 2806-07, 2808).

Traditional punishments include "imprisonment," "banishment," "punitive confiscation of property," and prohibition of "designated individuals or groups from participation in specified employments or vocations." *Nixon*, 433 U.S. at 474, 97 S. Ct. at 2806. The type of punishment about which Springfield and ArmaLite protest clearly is not of the type "traditionally judged to be prohibited by the Bill of Attainder Clause." *Id.* at 475, 97 S. Ct. at 2806. At most, the legislation is a form of economic punishment, not traditionally cognizable under the bill of attainder prohibition. Thus, the economic punishment about which the weapon manufacturers complain, even if cognizable, is indirect and does not amount to punitive confiscation.

Likewise, the New Jersey weapons assault ban "reasonably can be said to further nonpunitive legislative purposes." *Id.* at 475-76, 97 S. Ct. at 2806-07. The comprehensive nature of the assault weapons ban evinces the Legislature's concern that assault weapons present a danger to human life, and thus should be banned. In other words, "legitimate justifications for passage of the Act are readily apparent." *Id.* at 476, 97 S. Ct. at 2807.

Finally, nothing in the weapons ban "evinces an ... intent to punish." *Id.* at 478, 97 S. Ct. at 2808. There is no indication that the New Jersey Legislature's motivation was anything other than a legitimate desire to protect the safety and welfare of the citizens of the state. Despite plaintiffs' allegations that "firearms with the same calibers and firing capacities manufactured by others may be freely sold and possessed," (Compl. P 106), it is quite significant that the legislation actually casts a much wider net, banning similar weapons by specific name, as well as banning weapons which are 'substantially identical' to a listed weapon. *See* N.J.S.A. 2C:39-1w(2). As the Nixon Court concluded, "the Act's specificity ... does not automatically offend the Bill of Attainder Clause." *Id.* at 471-72, 97 S. Ct. at 2804-05. This court cannot say that the Legislature intended to punish Springfield and ArmaLite specifically; its intent was to control particular types of weapons.[28]

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[28] Plaintiffs' reliance on *SBC Communications, Inc. v. Federal Communications Comm'n*, 981 F. Supp. 996, 1001 (N.D. Tex. 1997), which invalidated a law aimed at certain Bell Companies, is misplaced. Better guidance is sought and found in *Fresno Rifle and Pistol Club, Inc. v. Van de Kamp*, 965 F.2d 723, 727-28 (9th Cir. 1992), which rejected virtually the identical bill of attainder challenge asserted here against a California firearms ban. *See also Springfield Armory, Inc. v. City of Columbus*, 805 F. Supp. 489, 493-96 (S.D.Ohio 1992), rev'd on other grounds, 29 F.3d 250 (6th Cir. 1993).

Because this court determines that the inclusion by name of Springfield and ArmaLite weapons on the list of banned weapons is not punishment, the court need not reach the other two facets of this doctrine. New Jersey's assault firearms ban does not constitute a prohibited bill of attainder.

CONCLUSION

For the foregoing reasons, defendants' motion for summary judgment will be granted, while plaintiffs' motion is denied. An appropriate order bearing the date of this decision will be entered in accordance with this opinion.

JOSEPH H. RODRIGUEZ

U.S.D.J.

Dated: March 31, 1999.

United States Constitution

Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment XIV

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

New Jersey Statutes

§ 2C:39-1. Definitions [29]

The following definitions apply to this chapter and to chapter 58:

f. "Firearm" means any handgun, rifle, shotgun, machine gun, automatic or semi-automatic rifle, or any gun, device or instrument in the nature of a weapon from which may be fired or ejected any solid projectable ball, slug, pellet, missile or bullet, or any gas, vapor or other noxious thing, by means of a cartridge or shell or by the action of an explosive or the igniting of flammable or explosive substances. It shall also include, without limitation, any firearm which is in the nature of an air gun, spring gun or pistol or other weapon of a similar nature in which the propelling force is a spring, elastic band, carbon dioxide, compressed or other gas or vapor, air or compressed air, or is ignited by compressed air, and ejecting a bullet or missile smaller than three-eighths of an inch in diameter, with sufficient force to injure a person.

i. "Machine gun" means any firearm, mechanism or instrument not requiring that the trigger be pressed for each shot and having a reservoir, belt or other means of storing and carrying ammunition which can be loaded into the firearm, mechanism or instrument and fired therefrom.

m. "Rifle" means any firearm designed to be fired from the shoulder and using the energy of the explosive in a fixed metallic cartridge to fire a single projectile through a rifled bore for each single pull of the trigger.

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[29] Only the definitions pertinent to this case are included.

n. "Shotgun" means any firearm designed to be fired from the shoulder and using the energy of the explosive in a fixed shotgun shell to fire through a smooth bore either a number of ball shots or a single projectile for each pull of the trigger, or any firearm designed to be fired from the shoulder which does not fire fixed ammunition.

o. "Sawed-off shotgun" means any shotgun having a barrel or barrels of less than 18 inches in length measured from the breech to the muzzle, or a rifle having a barrel or barrels of less than 16 inches in length measured from the breech to the muzzle, or any firearm made from a rifle or a shotgun, whether by alteration, or otherwise, if such firearm as modified has an overall length of less than 26 inches.

w. "Assault firearm" means:

(1) The following firearms:

Algimec AGM1 type
Any shotgun with a revolving cylinder such as the "Street Sweeper" or "Striker 12"
Armalite AR-180 type
Australian Automatic Arms SAR
Avtomat Kalashnikov type semi-automatic firearms
Beretta AR-70 and BM59 semi-automatic firearms
Bushmaster Assault Rifle
Calico M-900 Assault carbine and M-900
CETME G3
Chartered Industries of Singapore SR-88 type

Colt AR-15 and CAR-15 series
Daewoo K-1, K-2, Max 1 and Max 2, AR 100 types
Demro TAC-1 carbine type
Encom MP-9 and MP-45 carbine types
FAMAS MAS223 types
FN-FAL, FN-LAR, or FN-FNC type semi-automatic firearms
Franchi SPAS 12 and LAW 12 shotguns
G3SA type
Galil type Heckler and Koch HK91, HK93, HK94, MP5, PSG-1
Intratec TEC 9 and 22 semi-automatic firearms
M1 carbine type
M14S type
MAC 10, MAC 11, MAC 11-9mm carbine type firearms
PJK M-68 carbine type
Plainfield Machine Company Carbine
Ruger K-Mini-1 4/5F and Mini-1 4/5RF
SIG AMT, SIG 550SP, SIG 551SP, SIG PE-57 types
SKS with detachable magazine type
Spectre Auto carbine type
Springfield Armory BM59 and SAR-48 type
Sterling MK-6, MK-7 and SAR types
Steyr A.U.G. semi-automatic firearms
USAS 12 semi-automatic type shotgun
Uzi type semi-automatic firearms
Valmet M62, M71S, M76, or M78 type semi-automatic firearms
Weaver Arm Nighthawk.

(2) Any firearm manufactured under any

designation which is substantially identical to any of the firearms listed above.

(3) A semi-automatic shotgun with either a magazine capacity exceeding six rounds, a pistol grip, or a folding stock.

(4) A semi-automatic rifle with a fixed magazine capacity exceeding 15 rounds.

(5) A part or combination of parts designed or intended to convert a firearm into an assault firearm, or any combination of parts from which an assault firearm may be readily assembled if those parts are in the possession or under the control of the same person.

x. "Semi-automatic" means a firearm which fires a single projectile for each single pull of the trigger and is self-reloading or automatically chambers a round, cartridge, or bullet.

y. "Large capacity ammunition magazine" means a box, drum, tube or other container which is capable of holding more than 15 rounds of ammunition to be fed continuously and directly therefrom into a semi-automatic firearm.

z. "Pistol grip" means a well-defined handle, similar to that found on a handgun, that protrudes conspicuously beneath the action of the weapon, and which permits the shotgun to be held and fired with one hand.

§ 2C:39-3. Prohibited weapons and devices

j. Any person who knowingly has in his possession a large capacity ammunition magazine is guilty of a crime of the

fourth degree unless the person has registered an assault firearm pursuant to section 11 of P.L. 1990, c. 32 (C. 2C:58-12) and the magazine is maintained and used in connection with participation in competitive shooting matches sanctioned by the Director of Civilian Marksmanship of the United States Department of the Army.

§ 2C:39-5. Unlawful possession of weapons

f. Assault firearms. Any person who knowingly has in his possession an assault firearm is guilty of a crime of the third degree except if the assault firearm is licensed pursuant to N.J.S. 2C:58-5; registered pursuant to section 11 of P.L. 1990, c. 32 (C. 2C:58-12) or rendered inoperable pursuant to section 12 of P.L. 1990, c. 32 (C. 2C:58-13).

§ 2C:39-9. Manufacture, transport, disposition and defacement of weapons and dangerous instruments and appliances

g. Assault firearms. Any person who manufactures, causes to be manufactured, transports, ships, sells or disposes of an assault firearm without being registered or licensed to do so pursuant to N.J.S. 2C:58-1 et seq. is guilty of a crime of the third degree.

h. Large capacity ammunition magazines. Any person who manufactures, causes to be manufactured, transports, ships, sells or disposes of a large capacity ammunition magazine which is intended to be used for any purpose other than for authorized military or law enforcement purposes by duly authorized military or law enforcement personnel is guilty of a

crime of the fourth degree.

§ 2C:43-6. Sentence of imprisonment for crime; ordinary terms; mandatory terms

a. Except as otherwise provided, a person who has been convicted of a crime may be sentenced to imprisonment, as follows:

(1) In the case of a crime of the first degree, for a specific term of years which shall be fixed by the court and shall be between 10 years and 20 years;

(2) In the case of a crime of the second degree, for a specific term of years which shall be fixed by the court and shall be between five years and 10 years;

(3) In the case of a crime of the third degree, for a specific term of years which shall be fixed by the court and shall be between three years and five years;

(4) In the case of a crime of the fourth degree, for a specific term which shall be fixed by the court and shall not exceed 18 months.

§ 2C:58-12. Registration of assault firearms

a. Within 90 days of the effective date of P.L.1990, c.32 (C.2C:58-12 et al.), the Attorney General shall promulgate a list by trade name of any assault firearm which the Attorney General determines is an assault firearm which is used for legitimate target-shooting purposes. This list shall include, but need not be limited to, the Colt AR-15 and any other assault

firearm used in competitive shooting matches sanctioned by the Director of Civilian Marksmanship of the United States Department of the Army.

b. The owner of an assault firearm purchased on or before May 1, 1990 which is on the list of assault firearms determined by the Attorney General to be legitimate for target-shooting purposes shall have one year from the effective date of P.L.1990, c.32 (C.2C:58-12 et al.) to register that firearm. In order to register an assault firearm, the owner shall:

(1) Complete an assault firearm registration statement, in the form to be prescribed by the Superintendent of the State Police;

(2) Pay a registration fee of $50.00 per each assault firearm;

(3) Produce for inspection a valid firearms purchaser identification card, a valid permit to carry handguns, or a copy of the permit to purchase a handgun which was used to purchase the assault firearm which is being registered; and

(4) Submit valid proof that the person is a member of a rifle or pistol club in existence prior to the effective date of P.L.1990, c.32 (C.2C:58-12 et al.).

Membership in a rifle or pistol club shall not be considered valid unless the person joined the club no later than 210 days after the effective date of P.L.1990, c.32 (C.2C:58-12 et al.) and unless the rifle or pistol club files its charter with the Superintendent no later than 180 days following the effective date of P.L.1990, c.32 (C.2C:58-12 et al.). The rifle or pistol club charter shall contain the name and address of the club's

headquarters and the name of the club's officers.

The information to be provided in the registration statement shall include, but shall not be limited to: the name and address of the registrant; the number or numbers on the registrant's firearms purchaser identification card, permit to carry handguns, or permit to purchase a handgun; the name, address, and telephone number of the rifle or pistol club in which the registrant is a member; and the make, model, and serial number of the assault firearm being registered. Each registration statement shall be signed by the registrant, and the signature shall constitute a representation of the accuracy of the information contained in the registration statement.

c. For an applicant who resides in a municipality with an organized full-time police department, the registration shall take place at the main office of the police department. For all other applicants, the registration shall take place at any State Police station.

d. Within 60 days of the effective date of P.L.1990, c.32 (C.2C-58-12 et al.), the Superintendent shall prepare the form of registration statement as described in subsection b. of this section and shall provide a suitable supply of statements to each organized full-time municipal police department and each State Police station.

e. One copy of the completed assault firearms registration statement shall be returned to the registrant, a second copy shall be sent to the Superintendent, and, if the registration takes place at a municipal police department, a third copy shall be retained by that municipal police department.

f. If the owner of an assault firearm which has been registered pursuant to this section dies, the owner's heirs or

estate shall have 90 days to dispose of that firearm in accordance with section 12 of P.L.1990, c.32 (C.2C:58-13).

g. If an assault firearm registered pursuant to the provisions of this section is used in the commission of a crime, the registrant of that assault firearm shall be civilly liable for any damages resulting from that crime. The liability imposed by this subsection shall not apply if the assault firearm used in the commission of the crime was stolen and the registrant reported the theft of the firearm to law enforcement authorities within 24 hours of the registrant's knowledge of the theft.

h. Of the registration fee required pursuant to subsection b. of this section, $20.00 shall be forwarded to the State Treasury for deposit in the account used by the Violent Crimes Compensation Board in satisfying claims and for related administrative costs pursuant to the provisions of the "Criminal Injuries Compensation Act of 1971," P.L.1971, c.317 (C.52:4B-1 et seq.).

Supreme Court, U.S.
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OCT 17 2001
OFFICE OF THE CLERK

(2)

No. 01-120

Supreme Court of the United States

COALITION OF NEW JERSEY SPORTSMEN, INC., *et al.*,

Petitioners,

v.

DONALD T. DIFRANCESCO, ACTING GOVERNOR, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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Attorney for Respondents Donald T. DiFrancesco, Acting Governor; John J. Farmer, Jr., Attorney General; Carson J. Dunbar, Colonel, Division of State Police
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October 17, 2001

37 pp

QUESTION PRESENTED

Whether the court of appeals correctly affirmed the district court's standard summary judgment and abstention rulings in this pre-enforcement, multi-pronged challenge to the constitutionality of New Jersey's long-standing regulation of assault firearms (*N.J. Stat. Ann.* 2C:39-1 *et seq.* (West 1990)).

PARTIES TO THE PROCEEDING

In addition to the petitioner identified in the caption, petitioners include Bob's Little Sportshop, Inc.; Springfield, Inc.; Armalite, Inc.; Robert L. Viden, Jr.; Stephen D. McClure; and John Does I, II, III, IV, V, VI, VII, VIII and IX.

In addition to the respondent identified in the caption, respondents include John J. Farmer, Jr., Attorney General, State of New Jersey; Andrew N. Yurick, II, Prosecutor of Gloucester County, New Jersey; Patricia Kunchynski, Chief of Glassboro, New Jersey Police Department; and Carson J. Dunbar, Colonel, Division of State Police of New Jersey.

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OPINIONS BELOW

Respondents (hereinafter the State) concur with the statements set forth in the petition.

JURISDICTION

The State concurs with the statements set forth in the petition, with the clarification that the Court of Appeals for the Third Circuit also affirmed the district court's order denying summary judgment to petitioners (hereinafter the Coalition). (App. 4, 13, 65).[1]

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The State concurs with the statements set forth in the petition, with the clarification that also involved are *N.J. Stat. Ann.* 2C:58-5 and 13 (West 1990). (Supp. App.1-4).

STATEMENT OF THE CASE

This case involves a more than decade-old state statute of limited application regulating the possession of a very narrow group of specific weapons. The state supreme court has never analyzed the statute, much less rendered an authoritative construction of it. The district court, in a thorough opinion, carefully applied settled constitutional law in deciding that the State, not the Coalition, was entitled to summary judgment in this declaratory judgment action attacking New Jersey's 1990 Assault Firearms Act

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[1] "Pet." refers to the petition for writ of *certiorari*.
"App." refers to the appendix to the petition for writ of *certiorari*.
"Cir. App." refers to the appendix in the Third Circuit.
"Supp. App." refers to the supplemental appendix to this brief in opposition.

(hereinafter the Act) . The Court of Appeals for the Third Circuit agreed with this resolution.

Historically, the state legislature back in May 1990 passed a bill controlling the possession, sale, and transport of assault firearms and large capacity ammunition magazines. L.1990, c. 32; (App. 13). In seeking the law's passage, then-Attorney General Robert Del Tufo testified before the New Jersey Senate Judiciary Committee and acknowledged that the Act's intent did not touch upon any firearms used for legitimate hunting or target shooting purposes. (App. 14; Cir. App. 263-265). The Act amended and strengthened New Jersey's existing gun control laws, and was adopted to tackle the deadly crimes committed with assault firearms, the often-stolen "weapons of choice" for drug traffickers, violent offenders, and members of organized crime. (App. 49; Cir. App. 330, 334, 361-362, 642-646). Indeed, the federal government thereafter permanently banned import of 58 types of assault weapons into this country, and itself outlaws such weapons. 18 *U.S.C.* 921 (a)(30) and 922 (v) (1998); John M. Brody, *Clinton to Impose Ban on 58 Types of Imported Guns,* N.Y. Times, April 6, 1998, at A17.

Turning to the Act's unique statutory scheme, a gun may only be classified as an assault firearm in a limited number of ways. *N.J. Stat. Ann.* 2C:39-1w (West 1990); (App. 14-15; Cir. App. 170-172, 327, 483-484). The Act, too, applies only to semiautomatic, not traditional hunting, weapons. Guns requiring manual operation between shots, such as pump actions, bolt actions, lever actions, slide actions, or single shots, are entirely excluded, as are most semiautomatic rifles and shotguns. *N.J. Stat. Ann.* 2C:39-1w and 1x (West 1990); (App. 14). The Coalition incorrectly complains in its "Questions Presented" that the Act in part defines assault firearms "by 66 model names by specified manufacturers . . .," (Pet. i), whereas in truth several of the definitions specify no manufacturer whatsoever. *N.J. Stat. Ann.* 2C:39-1w(1) ("[a]ny shotgun with a revolving cylinder such as the

'Street Sweeper' or 'Striker 12'"; "Avtomat Kalashnikov type semi-automatic firearms"), 3, 4, and 5 (West 1990); (App. 29-30).

Possessing an assault firearm is prohibited in New Jersey unless it is among those listed by the Attorney General as legitimate for target shooting and its owner registered it, or obtained a license for it, or permanently rendered it inoperable. *N.J. Stat. Ann.* 2C:39-1y, 3, 5f, and 9g (West 1990); *N.J. Stat. Ann.* 2C:58-5, 12, and 13 (West 1990); (App. 15-16; Supp. App. 1-4).[2] A one-year grace period existed for those lawfully owning assault firearms as of the Act's May 30, 1990, effective date to either register them, transfer them, render them inoperable, or surrender them to the police. *N.J. Stat. Ann.* 2C:39-12 (West 1979); *N.J. Stat. Ann.* 2C:58-12b and 13 (West 1990); (App. 16; Supp. App. 3-4; Cir. App. 326-329). Assault firearms owners subsequently registered nearly 1,000 operable firearms, certified more than 900 as inoperable, and surrendered another 26 to the police. (Cir. App. 509-510, 512, 520, 523, 532).

More than six years after the state legislature enacted the assault firearms law, the Coalition decided to file a pre-enforcement declaratory judgment action in federal, rather than state, court challenging its constitutionality on a myriad of bases. (App. 12-13, 17; Cir. App. 3, 5, 61-100). In July 1998 both the State and the Coalition moved for summary judgment, and on March 31, 1999, the Honorable Joseph H. Rodriguez, U.S.D.J., granted the State's motion and denied the Coalition's. *Coalition of New Jersey Sportsmen, Inc. v. Whitman,* 44 F. Supp. 2d 666 (D.N.J. 1999); (App. 4, 8,

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[2] The Coalition incorrectly contends that knowing possession of a large capacity ammunition magazine is punishable by 18 months' imprisonment. (Pet. 3 n.3). Rather, it is punishable by a term not exceeding 18 months. *N.J. Stat. Ann.* 2C:39-3j and 2C:43-6a(4) (West 1990).

12-65; Civ. App. 8, 10-60, 136-139). In addressing the Coalition's numerous complaints about the Act's viability, the district court set forth the well-settled standard of review in deciding summary judgment motions. It then denied the State's general abstention request, and, based on the applicable legal precepts, rejected the Coalition's facial vagueness, equal protection, freedom of association, freedom of speech, and bill of attainder challenges. (App. 18-41, 46-65).

While also deciding that the Act was not vague as applied to certain situations, (App. 24-41), the district judge left for resolution on a case-by-case basis in the state courts many unsettled issues of state law, if the Coalition wished to pursue them there. These issues, "fraught with speculation," involved pre-enforcement "as applied" vagueness challenges to what was a facially valid law. (App. 41-46) (citing *Harman v. Forssenius*, 380 U.S. 528, 534 (1965), and *Poe v. Ullman*, 367 U.S. 497, 526 (1961) (Harlan, J., dissenting)).

The Coalition thereafter appealed this decision to the United States Court of Appeals for the Third Circuit in April 1999. The court subsequently dismissed the appeal. It, however, allowed the Coalition to reinstate the appeal in September 2000. (Cir. App. 1-2, 9).

In a memorandum opinion filed March 21, 2000, the court of appeals substantially agreed with the district court's analysis, reasoning, and conclusions, and addressed in that opinion several of the issues the Coalition had raised. (App. 1-8); *Coalition of New Jersey Sportsmen, Inc. v. Whitman*, 263 F.3d 157 (3d Cir. 2001). It agreed that the district court had applied the appropriate standard in evaluating the facial vagueness claims. (App. 4-5). It agreed that the district court had properly applied that standard to the Act's definitions of assault firearms. (App. 5-7). And it agreed that the district court had applied the proper standard in deciding the free speech claims. (App. 7). The Court of

Appeals for the Third Circuit therefore affirmed the district court's summary judgment decisions. (App. 4, 8). On April 26, 2001, the court of appeals denied the Coalition's petitions for rehearing and for rehearing *en banc*. (App. 9-11).

REASONS FOR DENYING THE PETITION

In this case the court of appeals afforded plenary review to the district court's detailed summary judgment and abstention decisions, examined the record created and the arguments made, and logically and properly determined that the Coalition's pre-enforcement facial attack upon New Jersey's assault firearms law was entirely unavailing. Thus the State was entitled to summary judgment even absent an evidentiary hearing, as the district judge had ruled. In this case the Coalition asks for nothing more than a reaffirmation of well-settled existing law, and no compelling reasons exist to grant the petition for a writ of *certiorari*. *Sup. Ct. R.* 10.

Involved here are multiple challenges to a narrow state law of limited application, which is not duplicated in either the federal or other statutory schemes regulating assault firearms. Indeed, the Act applies only to a small subclass of firearms that New Jersey was compelled to regulate to protect the public, and leaves alone guns used for legitimate target shooting or hunting purposes. The Coalition chose to bypass seeking a definitive interpretation of the Act in state court, and instead asks this Supreme Court to decide the constitutionality of a state statute that the state supreme court has never construed. *Contra City of Chicago v. Morales*, 527 U.S. 41, 61 (1999). This bypass caused the district court to abstain from deciding many "as applied" vagueness complaints because they involved unsettled areas of state law. (App. 44-46).

Additionally, as the State explained to the district court and court of appeals, the Coalition criticizes the Act for banning weapons specifically listed, those identical to them,

and those generically described. Apparently the Coalition believes that assault firearms cannot be regulated under any circumstances.[3] But this is not true.

POINT I
THE ACT IS NOT VAGUE.

Initially, the Act is not unconstitutionally vague. (Pet. 4-5, 6-19). Both courts faced with this issue below agreed with this conclusion, and with the legal road traveled to it. (App. 4-7, 24-46). Both agreed that the pre-enforcement facial vagueness challenge was to be measured by this Court's standard set forth in *Village of Hoffman Estates, Inc. v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489 (1982), which, too, addressed a pre-enforcement facial challenge to a law. In that case, this Court acknowledged that "[i]n a facial challenge to the overbreadth and vagueness of a law, a court's first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct." *Id.* at 491-92, 494.

The courts in this case dutifully adopted this very analysis. As the district court explained, the Act did not touch upon significant constitutionally protected conduct. (App. 24-28). This was because

> [a]lthough the complaint seeks to invalidate portions of the law which require membership in gun clubs based on the First Amendment's freedom of association, the void for vagueness arguments center on

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[3] As one legislator has remarked, "[i]f we restrict the list, we're damned because of the guns we left out. If we expand the list, we're damned for the guns we keep in." *Benjamin v. Bailey*, 662 A.2d 1226, 1239 n.12 (Conn. 1995).

> multiple phrases in the law which do not implicate constitutionally protected conduct. In other words, the alleged vagueness of the law is attacked in a pre-enforcement review action based on due process, not, as in many cases, the First Amendment, which would heighten judicial scrutiny.

(App. 28).

Therefore the proper level of scrutiny applied to those portions of the Act the Coalition challenged as facially vague was, as both courts agreed, whether the law was impermissibly vague in all of its applications and did not provide minimally fair notice of what it prohibited. (App. 4, 28-29); *see Village of Hoffman Estates, Inc. v. Flipside, Hoffman Estates, Inc.*, 455 U.S. at 494-97; *Steffel v. Thompson*, 415 U.S. 452, 474 (1974); *National Rifle Ass'n of Am. v. Magaw*, 132 F.3d 272, 293 (6th Cir. 1997); *Navegar, Inc. v. United States*, 103 F.3d 994, 1001 (D.C. Cir. 1997); *Richmond Boro Gun Club, Inc. v. New York*, 896 F. Supp. 276, 289 (E.D.N.Y. 1995), *aff'd*, 97 F.3d 681, 684 (2d Cir. 1996). The logic and reasonableness of the conclusions reached by the district court and Third Circuit dictated that those decisions of this Court calling for a more rigid vagueness standard for statutes implicating a substantial amount of constitutionally protected conduct were not the proper vehicles by which to decide this facial challenge. (App. 4, 28 n.14) (citing *City of Chicago v. Morales*, *supra*, and *Kolender v. Lawson*, 461 *U.S.* 352 (1983)); *contra* Pet. 6-14.

Nor is the Coalition correct in its claim that a perceived lack of scienter in a portion of the Act, and its concomitant effect on the vagueness analysis, was a matter that eluded both courts. (Pet. 6-19). Rather, each squarely addressed this issue.

The district court understood, in analyzing the Coalition's numerous "as applied" vagueness claims, that this Court in *Hoffman Estates* had set forth "a relatively strict" vagueness test for criminal statutes. (App. 41-42). However, while the Act was criminal in nature, the concern for constitutionally protected rights was "notably absent . . . ." (App. 42). And while a portion of the Act on its face did not require a level of scienter, which was but one factor to consider, the Attorney General had issued several directives and guidelines to law enforcement officials regarding the Act's reach; one in 1996 required an element of scienter at least as to "substantially identical"[4] assault firearms.[5] (App. 42-44; Cir. App. 170-172, 291, 326-329, 514, 524-525, 528-529, 544, 548, 556, 560, 565, 570, 575, 580); *see Village of Hoffman Estates, Inc. v. Flipside, Hoffman Estates, Inc.*, 455 U.S. at 494, 498-99.

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[4] The Coalition's reliance on two unpublished state court decisions, which lack any precedential value, *N.J. Ct. R.* 1:36-3, does not aid its cause. (Pet. 18, 18 n.20). As the State explained to the district court and court of appeals, *State v. Merrill* (Cir. App. 287-290) and *State v. Tanis*, No. A-5335-95T4 (N.J. Super. Ct. App. Div. Aug. 24, 1998) (Cir. App. 312-325), involved as applied, not facial, vagueness decisions as to "substantially identical" assault firearms. After *Merrill* the Attorney General issued relevant guidelines regarding "substantially identical" guns. (App. 6, 36, 43). Also, the district court here refrained from deciding many unsettled "as applied" issues of state law. (App. 41-46).

[5] Errors exist in the substantive text of the Coalition's appendix. Relative to the 1996 directive, the district court determined that the Attorney General had written that proof was required that a "'defendant knows that the firearm is "substantially identical" to one of the named assault weapons.' (Defendant's Exh. B, p. 3). In sum, the Attorney General seemingly claims . . .," not that "'defendant knows that the firearm is "substantially identical" to one Attorney General seemingly claims . . . .'" (App. 43); *Coalition of New Jersey Sportsmen, Inc. v. Whitman*, 44 F. Supp. 2d at 683. Also, *compare* App. 7 *with* court of appeals memorandum opinion at 7.

These unsettled areas of state law, and additional circumstances, gave the district court pause. It thus abstained from ruling on the many "as applied" challenges to what was a facially valid Act because "[l]imiting constructions of the law may render moot what would otherwise be broad pronouncements of state law based on federal constitutional questions," understanding that the Coalition was free to seek declaratory judgment in state court. (App. 44-46); *N.J. Stat. Ann.* 2A:16-50 to 62 (West 1924). Therefore it left for the state courts the quagmire of unresolved "as-applied" claims. *See Peoples Rights Org., Inc. v. Columbus*, 152 F.3d 522, 539-40 (6th Cir. 1998) (Merritt, J., dissenting) ("I would wait and see how the law is applied and not try to answer a host of hypothetical questions in a long opinion in a declaratory judgment case. I would wait for a real case.")

The Third Circuit, while not specifically addressing in its opinion the district court's restraint in this particular area, agreed that whether a statute prohibited or constrained constitutionally protected conduct, not whether the law was criminal or civil, was the proper standard for analysis. (App. 5). Applying that standard here meant that the Act had to be impermissibly vague in all its applications, a standard that the district court had correctly applied in rejecting the Coalition's facial vagueness claims. (App. 5-7); *contra* Pet. 6-14.

The Coalition also overstates an alleged "split" between courts of appeals in addressing facial vagueness standards. (Pet. 4-6, 15-16). Initially, the State admits that both the district court and Third Circuit declined to follow the Sixth Circuit's analysis of a facial vagueness challenge to a city's assault weapons ban. (App. 5, 39-40). But these courts were not analyzing a particular federal statute, or even similarly worded state laws. *National Rifle Assoc. of Am. v. Magaw,* 132 F.3d at 292. Rather, the Third Circuit was interpreting a New Jersey state statute worded one way and the Sixth Circuit twice interpreted Columbus city ordinances worded quite another. (App. 12-13); *Peoples Rights Org., Inc. v.*

Columbus, 152 F.3d at 525; *Springfield Armory, Inc. v. Columbus,* 29 F.3d 250, 251 (6th Cir. 1994). Of course courts will necessarily differ in interpreting the many laws the many states and municipalities adopt in regulating firearms.

For example, the Sixth Circuit was faced with an ordinance that prohibited named assault weapons and similar guns, but only those similar ones made by the same manufacturer. *Id.* Here the Third Circuit addressed New Jersey's Act, which regulates possession of certain named assault firearms, and any others described in the statute without regard to manufacturer. *N.J. Stat. Ann.* 2C:39-1w (West 1990). And the Ohio ordinance included an invalid "grandfather" clause and was not subject to any type of clarifying interpretation, contrary to the Act. (App. 6, 36, 42-44); *Peoples Rights Org., Inc. v. Columbus,* 152 F.3d at 530-32; *see Village of Hoffman Estates, Inc. v. Flipside, Hoffman Estates, Inc.*, 455 U.S. at 494. Lastly, the Sixth Circuit addressed an ordinance the city modified to specifically eliminate a scienter requirement, quite unlike the relevant statute here. (App. 5, 42-44; Cir. App. 170-172, 291, 326-329); *N.J. Stat. Ann.* 2C:39-5f (West 1990) ("[a]ny person who knowingly has in his possession an assault firearm is guilty of a crime . . ."); *Peoples Rights Org., Inc. v. Columbus*, 152 F.3d at 534; *see State v. Pelleteri*, 294 N.J. Super. 330, 334-35, 683 A.2d 555, 557-58 (App. Div. 1996), *certif. denied*, 148 N.J. 461, 690 A.2d 609 (1997). Therefore no true "split" exists, and compelling differences arise between the cases the respective courts of appeals decided that help explain their approaches. *Contra* Pet. 4-5, 15-16. One cannot forget, either, that the impact of any conflict is narrowly confined and not of a recurring nature.

Beyond these differences, the district court here reasoned that the Sixth Circuit's heightened standard of review did not apply to the Coalition's facial vagueness challenge to a narrow portion of the Act, section 1w(5), which dealt with "a part or combination of parts" that would constitute an assault

firearm. This was particularly so because the Act had a core meaning and neither reached significant constitutionally protected conduct nor gave unfettered discretion to law enforcement officials. (App. 4-5, 39-40); *see Richmond Boro Gun Club, Inc. v. New York*, 97 F.3d at 684-86; *Vandergriff v. Chattanooga*, 44 F. Supp. 2d 927, 936-37 (E.D. Tenn. 1998), *aff'd*, 182 F.3d 918 (6th Cir. 1999); *Kasler v. Lockyer*, 2 P.3d 581, 592 (Cal. 2000), *cert. denied*, ___ U.S. ___, 121 S. Ct. 1090 (2001); *contra City of Chicago v. Morales*, 527 U.S. at 55, 55 n.22, 60-61 (plurality); *Forbes v. Napolitano*, 236 F.3d 1009, 1011 (9th Cir. 2000), *amended and superseded by* 247 F.3d 903, *amended by* 260 F.3d 1159 (9th Cir. 2001).

For these reasons, the Act is not vague. Involved here is a unique law with very limited reach that the state supreme court has never interpreted, and the proper application of this Court's relevant decisions. Also present in the case are numerous unsettled areas of state law, which caused the courts below to refrain from deciding them and left the Coalition free to pursue the matters in state court. Finally, the Coalition overstates the alleged conflict between the circuits on the vagueness standard used to evaluate differing state assault weapons statutes in pre-enforcement facial attacks; indeed, no true conflict exists. Because the decisions of the district court and court of appeals were consistent with this Court's standards for addressing alleged vagueness, the petition for a writ of *certiorari* should be denied.

POINT II

THE ACT DOES NOT VIOLATE FREE SPEECH OR EQUAL PROTECTION OF THE LAW.

The Coalition next complains that the Act's "name ban" violates gun manufacturers' free speech and equal protection rights. (Pet. 5, 19-24). Essentially, it parrots the argument

made before the district court and court of appeals that the Act censors particular gun manufacturers from using certain names for their weapons. The decisions below, however, are harmonious with this Court's relevant decisions, and present no important, unresolved question of federal law that this Court must settle. *Sup. Ct. R.* 10(c); *contra* Pet. 5.

The Act logically defines certain assault firearms by name, defines others as those made by any manufacturer under any designation that is substantially identical to any firearm in section 1w(1), defines described semiautomatic shotguns with certain magazine capacities or other features, defines described semiautomatic rifles with certain fixed magazine capacities, and defines a part or combination of parts that are prohibited. *N.J. Stat. Ann.* 2C:39-1w(1)-(5) (West 1990); (App. 14-15); *contra* Pet. 19-20. It bars no speech, and forbids no manufacturer from naming any gun in any manner it chooses. Rather, the state legislature, similar to Congress, validly determined that some specific, perhaps notorious guns had to be banned or strictly controlled via registration, licensing, or by being rendered inoperable. *See* 18 *U.S.C.* 921(a) (30) (A) and 922(v) (1998); (Cir. App. 344, 355, 361, 368-369).

The district court acknowledged that this was not a typical commercial free speech case because "the Act . . . does not prohibit or criminalize the naming itself." (App. 59-60). "Erring on the side of caution" despite the ability to remove the matter from the commercial free speech realm, Judge Rodriguez applied this Court's well-settled legal standards in analyzing such speech regulations. (App. 60); *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 564 (1980). The judge concluded that the State had a substantial interest in regulating assault firearms, that the "fit" between the Act's ends and the means chosen to accomplish those ends was snug, and that the commercial speech restrictions, "which are minimal to begin with[,]" were properly tailored to achieve the State's goal. (App. 60-

62); *contra* Pet. 22. "Confined to words as we all are," the district court reasoned elsewhere in its opinion that "it is inconceivable that any legislator could list all prohibited weapons, given their sheer numerosity and the ever evolving development of new weapons, often based on old designs." (App. 35-36 (1998 Department of Treasury study found 39 models of semiautomatic rifles based on AK47 design alone), 62; Cir. App. 333).

Turning to the Coalition's equal protection argument, the district court properly applied a rational basis review because the Act burdened no fundamental constitutional right and targeted no suspect classification. The judge determined that the link between public safety and regulating assault firearms "is . . . obvious . . .," and held that the equal protection claim was without merit. (App. 46-52); *see Vacco v. Quill,* 521 U.S. 793, 798 (1997); *Romer v. Evans*, 517 U.S. 620, 631 (1996).

The Third Circuit agreed with the district court's free speech and equal protection analyses. (App. 4, 7). Involved here were not content-based restrictions on speech invoking strict scrutiny, but rather commercial speech that Judge Rodriguez had properly interpreted:

> The District Court correctly applied that test for commercial speech to the restriction at issue in holding that the statute was constitutional, that there was a reasonable fit between the use of specific named weapons and the governmental interest in banning assault weapons, and that the restriction on words was no more extensive than necessary to serve that interest.

(App. 7); *see Los Angeles Police Dep't v. United Reporting Publ'g Corp.*, 528 U.S. 32, 37 (1999); *Florida Bar v. Went for It, Inc.*, 515 U.S. 618, 623 (1995).

Obviously the New Jersey legislature, like Congress, could regulate a limited subset of weapons by name.

The Coalition wrongly claims that this Court's decision in *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803 (2000), compels a strict scrutiny test. (Pet. 21-22). While acknowledging that one could argue that commercially expressing oneself in the illegal transaction of weapons banned from New Jersey is afforded no First Amendment protection at all, the district court nonetheless addressed the claim raised and, out of an abundance of caution inuring to the Coalition's benefit, subjected it, as did the court of appeals, to a commercial speech analysis. (App. 5, 58-62). In *Playboy*, a federal statute applied only to certain television channels and programmers primarily dedicated to sexually explicit adult programming, and to no others regardless of their programming content. *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. at 812-13. Under the Act, in stark contrast, both named assault firearms and any other substantially identical ones are prohibited regardless of manufacturer. This obviates the type of content-based problem this Court faced in *Playboy*. Simply put, New Jersey is not barring or restricting speech, but rather regulates particularly notorious or popular weapons in a commercial context. *See Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993); (Pet. 22).

Also unpersuasive is the Coalition's complaint that the Act violates equal protection. (Pet. 22-24). As explained, the Act does not "confine[] its prohibition to named manufacturers" such as Springfield and Armalite, *contra* Pet. 22-23, but also bans substantially identical and other assault firearms regardless of manufacturer. *N.J. Stat. Ann.* 2C: 39-1w(1)-(5) (West 1990). This cures the deficiency found in the

city ordinances in *Springfield Armory, Inc. v. Columbus*, 29 F.3d 250, 251-53 (6th Cir. 1994), and *Citizens for a Safer Community v. Rochester*, 627 N.Y.S. 2d 193, 197, 200, 203-04 (N.Y. Sup. Ct. 1994), which outlawed only named or certain manufacturers' guns and not similar or essentially identical ones. *Contra* Pet. 23-24.

For these reasons, the Act does not violate free speech or equal protection in regulating some assault firearms by name. The district court and Third Circuit correctly applied a commercial speech analysis to the Act, and found no free speech violation. That some gun manufacturers make weapons that the legislature chose to list by name, while their competitors are prohibited under another part of the Act from marketing identical or substantially identical firearms, generates no equal protection crisis. The decisions of the courts in this case are consistent with this Court's standards for addressing alleged free speech and equal protection claims, and no important questions of federal law demands intervention. The petition for a writ of *certiorari* should be denied.

POINT III

THE ACT DOES NOT VIOLATE FREEDOM OF ASSOCIATION OR EQUAL PROTECTION OF THE LAW.

In a last attempt to entice this Court to grant a writ of *certiorari*, the Coalition complains that the more than decade-old Act shortchanges Coalition members' freedom of association and equal protection rights. (Pet. 24-30). Again, the Coalition basically parrots the argument made before the courts below that requiring gun club membership to have registered certain assault firearms and to possess large capacity ammunition magazines, which the State could have outlawed altogether, is unconstitutional. The district court

and Third Circuit correctly rejected this complaint, too, and found the Act valid.

Any and all New Jersey owners of assault firearms legitimate for target shooting purposes purchased on or before May 1, 1990, had a full year from the Act's May 30, 1990, effective date to register them. One registration requirement was valid membership in a rifle or pistol club that existed before the effective date. *N.J. Stat. Ann.* 2C:58-12b (West 1990); (App. 52 n.24). Possessing large capacity ammunition magazines is illegal unless the individual has registered an assault firearm pursuant to section 12 and maintains and uses the magazine in connection with participation in competitive shooting matches that the Director of Civilian Marksmanship sanctions. *N.J. Stat. Ann.* 2C:39-3j (West 1990); (App. 52 n.25).

The Act thus validly required those wishing to register assault firearms legitimate for target shooting purposes, and to possess large capacity ammunition magazines for these guns that are used and maintained in connection with participation in certain sanctioned shooting matches, to be members of a rifle or pistol club before May 30, 1991. This statutory structure, which did not require club membership as of the time the Act was passed, offends neither freedom of association nor equal protection standards.

The district court, in dismissing the Coalition's complaint, correctly applied settled law to the Act's relevant sections. The court acknowledged that the right to freely associate had a corollary right not to associate. (App. 54); *see Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000); *Wooley v. Maynard*, 430 U.S. 705, 714 (1977). It properly reasoned that rational basis review applied here because club membership burdened no fundamental right. (App. 54-58).

The district court found inapt the Coalition's reliance on another district court opinion to prop up its claim, explaining

that the Act required no arbitrary and irrational preference for those with a particular political, *i.e.*, National Rifle Association (hereinafter NRA), membership to receive a public benefit, which was "constitutionally significant." (App. 54-55); *Gavett v. Alexander*, 477 F. Supp. 1035 (D.D.C. 1979)[6]; *contra* Pet. 27. It logically held that the State had a legitimate interest in the ownership or reliance interests of assault firearms owners, and rationally linked retention of such weapons, unless licensed or rendered inoperable, with membership in clubs where they might properly be used; the State could have completely abrogated ownership of such dangerous weapons if it had so desired. (App. 55-56). And the district court correctly rejected the claim that the Act failed to satisfy the rational basis analysis, concluding that while the state legislature clearly intended the law to be broad enough to reach potentially deadly assault weapons, it was equally concerned with preserving the rights of those legitimately using them for shooting competitions. (App. 56-58; Cir. App. 264-265); *see Besig v. Dolphin Boating and Swimming Club*, 683 F.2d 1271, 1276 (9th Cir. 1982).

The district court also fully addressed, and rejected, the Coalition's equal protection attack on gun club membership. It determined that equal protection, which applies only to people, simply prevents lawmakers from treating differently those who are in all relevant respects alike. (App. 47-50). The lack of a suspect classification or of a burden to a fundamental right meant that the Act need only rationally relate to a legitimate state interest, and here the Coalition was not a suspect class and no fundamental right to weapon

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[6] Indeed, the district court in *Gavett* spelled out that federal governmental sales of guns at a reduced price may be premised on gun club membership and current competitive shooting activity so that those though to be willing and able to use them could do so. *Id.* at 1039-42, 1046. But now the window to register certain assault firearms has long since closed in New Jersey.

ownership existed. (App. 47-49); *Vacco v. Quill*, 521 U.S. 793, 799 (1997); *Heller v. Doe*, 509 U.S. 312, 319-21 (1993); *Kasler v. Lockyer*, 2 P.3d 581, 586 (Cal. 2000), *cert. denied*, ___ U.S. ___, 121 S. Ct. 1090 (2001). Thus, given the State's valid interest in regulating assault firearms and their great destructive power, the district court found no equal protection violation. (App. 47, 49; Cir. App. 332, 334, 361-362, 642, 646).

Faced with these claims on appeal, wherein the Coalition did not quarrel with the rational basis standard of review, the Third Circuit was in substantial agreement with the district judge's analysis, reasoning, and conclusions. It therefore affirmed without expanding on the district court's approach. (App. 4).

The Coalition is simply wrong in its position before this Court. Requiring owners of assault firearms deemed legitimate for target shooting purposes to prove, by a date certain, membership in an established rifle or pistol club logically relates to the valid purposes of ensuring that those with such destructive weapons, which otherwise would be illegal to possess if not licensed or rendered inoperable, have a valid reason to do so. The State could, if it wanted, simply bar any private possession of assault firearms as a valid exercise of its police powers, particularly given the dramatic increase in the use of such weapons in criminal activity. *See Gun South, Inc. v. Brady*, 877 F.2d 858, 863 (11th Cir. 1989). The Act involves no irrational, arbitrary classification based on land ownership where an individual had to produce two freeholder witnesses to purchase a deadly weapon, which courts understandably view skeptically, *Hetherton v. Sears, Roebuck & Co.*, 652 F.2d 1152, 1157-58 (3d Cir. 1981), nor does it involve a suspect or even a quasi-suspect class, *Galioto v. Department of the Treasury*, 602 F. Supp. 682, 686 (D.N.J. 1985), *vacated as moot*, 477 U.S. 556 (1986). *Contra* Pet. 29 n.27. The Act also did not condition ownership rights only on gun club membership as of the date

it became law. Rather, even non-club members had a year to join and register their assault firearms legitimate for target shooting purposes, or they could have licensed or rendered them inoperable. The window the state legislature created therefore was left open to all citizens without discrimination. *Contra Romer v. Evans*, 517 U.S. 620, 631-32 (1996); *Peoples Rights Org., Inc. v. Columbus*, 152 F.3d 522, 531-32 (6th Cir. 1998); Pet. 29.

The Coalition's final complaints -- that "many" gun clubs are private affiliates of the "highly political" NRA and that few gun club members are women -- ring hollow. (Pet. 25-27). The Coalition itself is an NRA formation, and each John Doe plaintiff is an NRA member. It cannot claim that all, or even most, clubs are NRA affiliates, nor does the Act require that gun clubs be private; in fact, many are open to public entities or use public facilities likely subject to anti-discrimination laws. And women, while comprising 4.6% of club members, own less than 1% of the registered assault firearms. (App. 53; Cir. App. 237, 546, 550, 553-558, 563, 568, 572, 577, 582, 596). The Coalition also presented no evidence whatsoever before the district court that "gun clubs engage in advocacy" simply because some may be NRA associates. *Contra* Pet. 26-27. It certainly cannot claim the shelter of a strict scrutiny analysis via a tortured "requirement of NRA membership" argument that is not true. *Contra* Pet. 29.

In sum, New Jersey's regulation of assault firearms violates no constitutional freedom of association or equal protection right. The district court and Third Circuit correctly analyzed these complaints under the applicable legal standards in the context of this pre-enforcement action, and found them to be without merit. This Court thus should deny the petition for a writ of *certiorari*.

CONCLUSION

For the foregoing reasons, the State respectfully requests that the petition for a writ of *certiorari* be denied.

Respectfully submitted,

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Dated: October 17, 2001

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2C:58-5. **Licenses to possess and carry machine guns and assault firearms**

a. Any person who desires to purchase, possess and carry a machine gun or assault firearm in this State may apply for a license to do so by filing in the Superior Court in the county in which he resides, or conducts his business if a nonresident, a written application setting forth in detail his reasons for desiring such a license. The Superior Court shall refer the application to the county prosecutor for investigation and recommendation. A copy of the prosecutor's report, together with a copy of the notice of the hearing on the application, shall be served upon the superintendent and the chief police officer of every municipality in which the applicant intends to carry the machine gun or assault firearm, unless, for good cause shown, the court orders notice to be given wholly or in part by publication.

b. No license shall be issued to any person who would not qualify for a permit to carry a handgun under section 2C:58-4, and no license shall be issued unless the court finds that the public safety and welfare so require. Any person aggrieved by the decision of the court in granting or denying an application, including the applicant, the prosecutor, or any law enforcement officer entitled to notice under subsection a. who appeared in opposition to the application, may appeal said decision in accordance with law and the rules governing the courts of this State.

c. Upon the issuance of any license under this section, true copies of such license shall be filed with the superintendent and the chief police officer of the municipality where the licensee resides or has his place of business.

d. In issuing any license under this section, the court shall attach thereto such conditions and limitations as it deems to be in the public interest. Unless otherwise provided by court order at the time of issuance, each license shall expire one

year from the date of issuance, and may be renewed in the same manner and under the same conditions as apply to original applications.

e. Any license may be revoked by the Superior Court, after a hearing upon notice to the holder thereof, if the court finds that the holder is no longer qualified for the issuance of such a license or that revocation is necessary for the public safety and welfare. Any citizen may apply to the court for revocation of a license issued under this section.

f. A filing fee of $75.00 shall be required for each application filed pursuant to the provisions of this section. Of this filing fee, $25.00 shall be forwarded to the State Treasury for deposit in the account used by the Violent Crimes Compensation Board in satisfying claims and for related administrative costs pursuant to the provisions of the "Criminal Injuries Compensation Act of 1971," P.L. 1971, c. 317 (C.52:4B-1 et seq.).

g. Any license granted pursuant to the provisions of this section shall expire two years from the date of issuance and may be renewed in the same manner and under the same conditions as apply to original applications. If the holder of a license dies, the holder's heirs or estate shall have 90 days to dispose of that firearm as provided in section 12 of P.L. 1990, c. 32 (C. 2C:58-13).

h. If an assault firearm licensed pursuant to the provisions of this section is used in the commission of a crime, the holder of the license for that assault firearm shall be civilly liable for any damages resulting from that crime. The liability imposed by this subsection shall not apply if the assault firearm used in the commission of the crime was stolen and the license holder reported the theft of the firearm to law enforcement authorities within 24 hours of the license holder's knowledge of the theft.

i. Nothing in P.L. 1990 c. 32 (C. 2C:58-12 et al.) shall be construed to abridge any exemptions provided under N.J.S. 2C:39-6.

2C:58-13. **One year period to transfer, render inoperable, or surrender assault firearm in lieu of registration**

a. Any person who legally owns an assault firearm on the effective date of this act and who is unable to register or chooses not to register the firearm pursuant to section 11 of P.L.1990, c. 32 (C.2C:58-12) may retain possession of that firearm for a period not to exceed one year from the effective date of this act. During this time period, the owner of the assault firearm shall either:

(1) Transfer the assault firearm to any person or firm lawfully entitled to own or possess such firearm;

(2) Render the assault firearm inoperable; or

(3) Voluntarily surrender the assault firearm pursuant to the provisions of N.J.S. 2C:39-12.

b. If the owner of an assault firearm elects to render the firearm inoperable, the owner shall file a certification on a form prescribed by the Superintendent of the State Police indicating the date on which the firearm was rendered inoperable. This certification shall be filed with either the chief law enforcement officer of the municipality in which

the owner resides or, in the case of an owner who resides outside this
State but stores or possesses an assault firearm in this State, with the Superintendent of the State Police.

c. As used in this section, "inoperable" means that the firearm is altered in such a manner that it cannot be immediately fired and that the owner or possessor of the firearm does not possess or have control over the parts necessary to make the firearm operable.

(3)

No. 01-120

In the Supreme Court of the United States

COALITION OF NEW JERSEY SPORTSMEN, INC.; BOB'S LITTLE SPORTSHOP, INC.; SPRINGFIELD, INC.; ARMALITE, INC.; ROBERT L. VIDEN, JR.; STEPHEN D. MCCLURE; JOHN DOE I, II, III, IV, V, VI, VII, VIII, & IX,

Petitioners

v.

DONALD T. DIFRANCESCO, Acting Governor, *et al.*,

Respondents

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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ARGUMENT

1. A clear circuit conflict has emerged concerning the standards to be applied in a pre-enforcement vagueness challenge to criminal provisions which lack scienter. The Third Circuit in this case, like the Second in *Richmond Boro Gun Club, Inc. v. City of New York*, 97 F.3d 681, 684-86 (2nd Cir. 1996), hold that a strict analysis is not warranted unless the First Amendment (or another selected constitutional right) is implicated. By contrast, the Sixth and Ninth Circuits hold that a strict review is warranted. *Springfield Armory, Inc. v. City of Columbus*, 29 F.3d 250 (6th Cir. 1994); *Peoples Rights Organization, Inc. v. City of Columbus*, 152 F.3d 522 (6th Cir. 1998); *Forbes v. Napolitano*, 236 F.3d 1009, 1011-12 (9th Cir. 2000).

All of the above cases involved prohibitions on possession of "assault weapons" except for *Forbes*, which concerned a prohibition on specified medical procedures on certain fetal tissue. *Id.* Nothing in this Court's jurisprudence suggests that a different rule of law would apply for such *mala prohibita* crimes.

Like the Second and Third Circuits, respondent disregards this Court's precedents other than *Village of Hoffman Estates v. Flipside Hoffman Estates, Inc.*, 455 U.S. 489 (1982), which is selectively quoted only to refer to the following: "In a facial challenge to the overbreadth and vagueness of a law, a court's first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct." *Id.* at 494, quoted in Respondents' Br. in Opp., 6.

Thus, the issue of constitutionally-protected conduct is only the "first step," not the last step, as New Jersey would have

it.[1] Moreover, New Jersey and the opinions it relies on invariably ignore the following further analysis in *Hoffman Estates*:

> [E]conomic regulation is subject to a less strict vagueness test . . . . The Court has also expressed greater tolerance of enactments with civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe. And the Court has recognized that a scienter requirement may mitigate a law's vagueness, especially with respect to the adequacy of notice to the complainant that his conduct is proscribed.

Id. at 498-99.

Nor is *Hoffman Estates* the only precedent that applies. "A criminal statute may be facially invalid even if it has some conceivable application." *Springfield Armory*, 29 F.3d at 252, citing *Kolender v. Lawson*, 461 U.S. 352, 358-59 n.8 (1983); *Colautti v. Franklin*, 439 U.S. 379, 395 (1979). A law is facially vague where it violates "the requirement that a legislature establish minimal guidelines to govern law enforcement." *Chicago v. Morales*, 527 U.S. 41, 60 (1999). Where "vagueness permeates the ordinance, a facial challenge is appropriate." *Id.* at 60.55 n.22.

New Jersey's statute cannot withstand application of the

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[1] The Third Circuit has long held that "the right of the people to keep and bear arms" in U.S. Const., amend. II, does not protect any individual right. *Tot v. United States*, 131 F.2d 261, 266 & n.13 (3rd Cir. 1942), *rev'd on other grounds*, 319 U.S. 463 (1943). *But see United States v. Emerson*, 2001 U.S. App. LEXIS 22386, *146 (5th Cir. 2001) ("the Second Amendment protects the right of individuals to privately keep and bear their own firearms").

above criteria. Outlawing some 66 named firearms (plus "series" and "type") and all those that are "substantially identical," on its face, sets no standard for either consumers or law enforcement. How would a consumer know that a firearm possessed is "substantially identical" to a firearm that such person neither has access to nor is even aware of? And how would the police know what is or is not "substantially identical" except by making up specifics as they go?

New Jersey argues that no circuit conflict exists because the laws at issue here and in the Sixth Circuit cases contain variations. Yet New Jersey's law fails the vagueness test even more clearly than did that in *Springfield Armory*, which referred to "other models by the same manufacturer with the same action design that have slight modifications or enhancements." 29 F.3d at 251. This narrowed its coverage by referring to the same manufacturer (the name of which would be engraved on the firearm) and the same "action design," while New Jersey's law refers to "substantially identical" without reference to anything.

Moreover, as explained in Judge Merritt's opinion in *Springfield*, "the ordinance is fundamentally irrational and impossible to apply consistently by the buying public, the sportsman, the law enforcement officer, the prosecutor or the judge." *Id.* This was true even though the crime had a "knowledge" element.[2] Finally, the penalties here are far harsher than the 6 month maximum jail in the Sixth Circuit

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[2] *Peoples Rights Organization, Inc. v. City of Columbus*, 152 F.3d 522, 534 (6th Cir. 1998) (noting that the former version in *Springfield* prohibited "knowingly selling or possessing an assault weapon").

cases:[3] imprisonment for three to five years. New Jersey Statutes (N.J.S.), §§ 2C:39-5f, -9g, 2C:43-6a(3).

New Jersey argues that pre-enforcement review should be deferred while prosecutions continue and perhaps the State's Supreme Court renders opinions. This would only ruin the lives of those prosecuted while the standards of review and the circuit split remain unresolved. Indeed, the need for this Court's clarification is exemplified in the recent decision in *State v. Petrucci*, 779 A.2d 429, 2001 N.J. Super. LEXIS 311, *14-15 (N.J. Super., App. Div. 2001), which agreed with the Third Circuit that "substantially identical" is not vague but included an analysis showing that the fact finder must arbitrarily decide that issue based on a potentially limitless array of facts.[4]

For the above reasons, this Court should resolve the circuit conflict concerning the standards to be applied in a vagueness challenge of criminal laws lacking scienter. This is particularly needed as a result of the proliferation of firearms prohibitions which, instead of describing features that the ordinary person can understand – such as barrel length measured in inches or the firearm's basic mechanism – list scores of exotic names without defining a single feature, and

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[3] *Peoples Rights Organization*, 152 F.3d at 528.

[4] *Petrucci* concerned whether a Chinese Norinco rifle was "substantially identical" to the Russian "AKM," a model of the "Avtomat Kalashnikov" which is listed in the New Jersey law. A State witness testified that it was, but listed 11 different features of the two rifles, beginning with the radical difference that the AKM is full automatic while the Norinco is only semiautomatic. He further testified to numerous variations in the "Avtomat" and to dissimilarities in appearance and function. *Id.* at *4-6. While *Petrucci* was remanded for trial, its discussion of the particulars clarifies that the phrase "substantially identical" sets no standard.

then essentially add "and other stuff like that."

2. The Act bans firearms according to the names imprinted on them, not according to any objective features. Respondent argues as if the names describe specific firearms, Br. 11-12, when in fact New Jersey has conceded that any firearm with a listed name is banned regardless of its features or the removal of any features. New Jersey admitted in the trial court:

> The Act prohibits Springfield from selling in New Jersey any firearm, no matter what its features, with the words "Springfield Armory BM59 and SAR-48" inscribed on them. . . . . The firearm so marked could be a .22 caliber single shot, but it would still be illegal.

Pls.' State. of Material Facts, Defs.' Counter State. of Material Facts ¶ 9. *See further* Pet. for Cert., 19-20.

The district court acknowledged that "the indirect effect of these listings are that manufacturers who wish to engage in business in New Jersey are restricted (in a very minor way) how they can name such a weapon." App. 60a. However, this Court in *Lorillard Tobacco Co. v. Reilly*, 121 S. Ct. 2404, 2428 (2001), clearly stated:

> The Court of Appeals recognized that the efficacy of the regulation was questionable, but decided that "in any event, the burden on speech imposed by the provision is very limited." . . . *There is no de minimis exception for a speech restriction that lacks sufficient tailoring or justification.* We conclude that the restriction on the height of indoor advertising is invalid under *Central Hudson*'s third and fourth

prongs. (Emphasis added.)

The referenced criteria of *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980), are that the speech restriction must directly and materially advance the asserted governmental interest, and that there must be a reasonable fit between the means and ends of the regulatory scheme. *Lorillard Tobacco*, 121 S. Ct. at 2428; *Central Hudson*, 447 U.S. at 564, 569. The banning of names without any relation to the design or features of an article, and regardless of how the design may be changed or the features removed, cannot meet that criteria.

Moreover, the ban is on mere possession, not on advertising. The Act restricts pure speech, not just commercial speech.

New Jersey argues that the "substantially identical" clause saves the name ban from depriving persons of equal protection of the laws. Br. 14-15. Not so. The Attorney General invented a criteria of generic features for firearms that are "substantially identical" and opined that such firearms can be removed from the Act simply by removing such features. However, this does not "apply to firearms that are specifically listed in *N.J.S.A.* 2C:39-1w(2) as prohibited firearms." Cir. App. 171-73a (Dept. of Law and Public Safety, March 31, 1997). Any firearm imprinted with a condemned name is plagued with original sin and can never escape its damnation.

New Jersey protests that it cannot name every one of what it wishes to ban and that banning a few scores of names plus "other stuff like that" is the best it can do. No where in its brief does it articulate exactly what features it finds objectionable or address why it does not simply adopt generic definitions describing those features. Its failure to do so simply does not override the protections of free speech and equal

protection.

3. "Freedom of association . . . plainly presupposes a freedom not to associate." *Boy Scouts of America v. Dale*, 120 S. Ct. 2446, 2451 (2000). While New Jersey does not dispute this principle in the abstract, it argues that only a rational basis need be found for requiring one to join a private club in order to retain property that the State would otherwise prohibit. Br. 16. However, "State action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny." *NAACP v. Alabama*, 357 U.S. 449, 460-61 (1958).

Nor has New Jersey articulated even a rational basis for the club-membership requirement. It speculates that the legislature "linked retention of such weapons . . . with membership in clubs where they might properly be used." Br. 17. No such linkage exists. In fact, the only specific "legitimate target-shooting purposes" for assault firearms mentioned in the Act are "competitive shooting matches sanctioned by the Director of Civilian Marksmanship [DCM]." N.J.S. 2C:58-12a. Membership in a club is not a condition for eligibility for participation in the Civilian Marksmanship Program. *See* § 1613, Tit. XVI, 104 P.L. 106, 110 Stat. 186 (1996). "All US citizens 16 years of age or older," without any requirement of club membership, may enter DCM matches. 32 C.F.R. § 544.30(a), (b).

In *Besig v. Dolphin Boating & Swimming Club*, 683 F.2d 1271, 1276 (9th Cir. 1982), a private club maintained facilities on public property, but the club allowed non-members to use its facilities. The court rejected a First Amendment claim on the following basis:

> Notwithstanding appellants' persistence in arguing under a nonassociation theory, they

> simply are not deprived of their right not to associate. *They need not join any club.* Nonmembers have been granted access to club facilities. That the access may be on less favorable terms than that granted to members may present other questions, but use of the club facilities does not depend on club membership or club association.

Id. (emphasis added). By contrast, the law in *Gavett v. Alexander*, 477 F. Supp. 1035 (D. D.C. 1979), "absolutely barred non-members from participating in the government-provided benefit."[5] *Besig*, 683 F.2d at 1276. That is the case here.

New Jersey argues that it could ban assault firearms altogether, and thus it could require preexisting owners to join gun clubs in order to retain their property. Br. 18. However, *Hetherton v. Sears, Roebuck & Co.*, 652 F.2d 1152, 1157-58 (3rd Cir. 1981), explains:

> While it may be true that Delaware could ban the sale of all deadly weapons, it does not follow that the State, *having abrogated its power to effect a total ban, can arbitrarily establish categories of persons who can or cannot buy the weapons*. . . . The question then is whether it is rational for Delaware to limit sales to persons who know two Delaware freeholders and can produce them as witnesses. We think that this question must be answered in

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[5] *Gavett v. Alexander*, 477 F. Supp. 1035, 1044-45 (D. D.C. 1979), invalidated the NRA membership requirement for purchase of a military rifle from the DCM. Contrary to New Jersey's suggestion, Br. 6, *Gavett* mentioned but did not consider the validity of a separate local club-membership requirement. *Id.* at 1042.

the negative. (Emphasis added.)

Similarly, the question here is whether New Jersey can limit retention of lawfully-acquired property to persons who can convince private clubs to accept them as members. This Court's jurisprudence suggests that this violates the rights of association and of equal protection.

CONCLUSION

This Court should grant this petition for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Third Circuit.

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